Mathayo v Republic (Criminal Appeal E052 of 2025)
[2026] KEHC 986 (KLR) (5 February 2026) (Judgment)

Neutral citation: [2026] KEHC 986 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E052 OF 2025

NIO ADAGI, J

FEBRUARY 5, 2026

BETWEEN

JOHN MUTALA MATHAYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being An appeal from the judgment of the Senior Resident Principal Magistrates Hon. Victoria Ochanda given on 13th May 2025 and sentencing done on 3rd June 2025 at Machakos Criminal S.O Case No. E002/2022)

JUDGMENT

Introduction

1. The Appellant John Mutala Mathayo was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on the 2nd January 2022 and 3rd January 2022 at[Particulars Withheld], Mitaboni Sub-location in Kathiani Subcounty within Machakos County knowingly and unlawfully caused your penis to penetrate the vagina M.S.N (name withheld) a child aged 14 years contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*.

2. In the alternative he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars are that on the 2nd January 2022 and 3rd January 2022 at[Particulars Withheld], Mitaboni Sub-location in Kathiani sub-county within Machakos County you intentionally and unlawfully touched the vagina of E.S.M. (name withheld) a child aged 14 years with his penis contrary to section 1 1(1) of the *Sexual Offences act*.

3. The Appellant pleaded not guilty to the main charge and the alternative charge and the matter was set down for hearing. The prosecution called three (3) witnesses in proving its case.

4. The Appellant gave sworn defence evidence and did not call a witness.

5. Upon considering the evidence adduced in support of the charge, the trial court on 13th May 2025 convicted the Appellant and sentencing was done on 3rd June 2025

The Petition of Appeal

6. Being dissatisfied with the decision of the trial court, the Appellant has lodged the instant appeal against both the conviction and sentence. The Appellant has filled sixteen (16) grounds of appeal in his Petition of Appeal dated 5th June 2025 as follows:

    1. That the Learned Magistrate erred in Law and fact in failing to find that the evidence adduced during the trial did not support the charge against the accused.

    2. That the learned Magistrates erred in law and fact in failing to find that the medical evidence adduced could not conclusively link the accused to the offence.

    3. The trial court erred on relying on the evidence of the complainant despite her being declared a hostile witness by the prosecution and thus it was unsafe to rely on her evidence without corroboration.

    4. The trial court erred in finding there was penetration despite the victim in their evidence having denied having engaged in any sexual activity on the material dates with the accused or at all

    5. The learned trial magistrate erred in failing to find that the P3 form and the PRC form indicated that there was no injuries noted on the private parts of the victim and the victim denied penetration.

    6. The learned Magistrate erred in failing to find that the doctor (PW3) indicated that the hymen was broken longtime ago and cannot be a basis in reaching a finding of the proof of penetration or not.

    7. The trial court ignored the failure by the state to avail examination results of the accused since his sample were taken but no results and therefore there was no medical evidence linking accused to the offence.

    8. The learned magistrate erred in failing to find that the prosecution did not avail crucial witness especially the investigation officer (I.O) to corroborate the prosecution evidence and a negative inference on why they were not called to testify ought to have been drawn

    9. That the Learned Magistrate erred in Law and fact in holding that the complainant was aged 14 years and relying on a certificate of birth which was only marked for identification and not produced in court as exhibit and thus the Defence did not get a chance to cross examine on the same. The court therefore relied on non-existent certificate of birth

    10. That the Learned Magistrate erred in Law and fact in failing to find that the prosecution did not prove the ingredients of defilement against the accused person.

    11. The Learned Magistrate erred in law and fact in relying on the uncorroborated evidence of PW2 (Grandmother to the Complainant) only to convict the accused despite no reasons recorded in the proceedings which made the court to be satisfied that she was telling the truth.

    12. The trial Court erred in law and fact by convicting and sentencing the Appellant on inconsistent, doubtful and contradictory evidence.

13. The trial Court erred in law and fact by considering extraneous factors and evidence which was not tendered during trial in convicting and sentencing the Appellant.

14. The trial Court erred in law and fact by convicting and sentencing the Appellant based on documents which had not been produced as exhibits

15. That the Learned Magistrate erred in Law and fact in failing to consider the accused's defence, submissions and mitigation in this matter.

16. That the Learned Magistrate erred in issuing a very high sentence of Twenty (20) years imprisonment and failed to observe the issue of minimum mandatory sentence, which is unconstitutional.

7. The Appellant prayed that:

a. The appeal be allowed

b. That the conviction be quashed and the sentence set aside or varied as the honourable court deems fit

c. That in the alternative, an order of re-trial be granted

d. Any other or such other better reliefs as this honourable court deems fit to grant in the circumstances.

8. The appeal was canvassed through written submissions.

Appellant's submissions

9. The Appellant submitted that the trial court failed to find that the prosecution did not prove the ingredients of defilement against the Appellant.

10. It was argued that in a case of defilement, it is crucial for the essential ingredients of defilement to be proved. In the case of Julius Kioko Kivuva V R. (Machakos Criminal Appeal 60 of 2014), court quoted in approval the case of Charles Wamukoya Karani v r (Criminal Appeal No 72 of 2013) where court held that:-

> " the critical ingredient forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant"

11. It was submitted that the prosecution did not prove its case beyond reasonable doubt to warrant the accused's person conviction.

12. The Appellant contended that the AGE of the complainant was not proved as required in this case. The Charge sheet indicated that the complainant was aged 14 years as the time of commission of the alleged offence (January 2022). PW1 (The Victim) while testifying stated that she was 17-years old since she was born in the year 2006. During her evidence PW1 testified that she was born on 30/11/2008.

13. That PW2 JKM (grandmother to Victim) also gave evidence. she thought that the victim was about 15 years date of birth being 2007. A certificate of birth was marked for identification as PMF1. The investigating officer did not testify as the prosecution on 15/10/2024 closed its case and thus the certificate of birth which had been marked was never produced as an exhibit in court.

14. The Appellant referred to the trial court's judgment (at page 5 which is at page 91 of the record of appeal) noted that the date of birth was 30/11/2007 the stated that the birth certificate had been

identified. The court noted that the grandmother in a testimony told the court that the complainant was born in 2007. The trial court held that a birth certificate is not the only way of determining the age of the complainant for purposes of defilement.

15. That indeed, the court correctly found that the birth certificate was only marked for identification. However, it went ahead to rely on the evidence of the grandmother to determine the age of the minor and held that the court was convinced she was born in 2007 and therefore was 14 years and minor at the time of defilement.

16. The Appellant submitted that this was an error for the court to rely on grandmother's testimony as proof of age. The birth certificate was not produced as an exhibit in court and therefore one of the crucial ingredients of the offence of defilement was not proved.

17. Reliance was placed on Hadson Ali Mwachongo vs Republic (Appeal from the judgment of the High Court of Kenya at Mombasa (Muya, J.) dated 29th May 2014 in H.C.CR.A. No. 249 of 2011) Criminal Appeal No. 65 of 2015 the court of appeal held

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. In Alfayo Gombe Okello v. Republic, Cr. App. No. 203 of 2009 (Kisumu), this Court stated as follows: "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)..." (See also Kaingu Elias Kasomo v. Republic, Cr. App. No. 504 of 2010 (Malindi). Evidence of DC's age was given by her mother, PW2 who testified that DC was born on 3rd January 1995. DC herself confirmed that she was 15 years old when she testified on 17th January 2011. Her Certificate of Birth No. 733713, which was produced in evidence showed DC's date of birth to be 3rd January 1995 as, testified by her mother. There was also the age assessment report prepared by Medical Superintendent, Moi Hospital, Voi and dated 16th November 2010 estimating DC's age to be 16 years old. The appellant contends that there was reasonable doubt whether DC was 15 or 16 years old. The evidence of DC's mother and the certificate of birth confirmed DC's specific date of birth, which means when the offence was committed, she was 15 years, 6 months and 13 days old. The age assessment report gave 16 years as the estimated age of DC. In light of the evidence of DC's mother and her certificate of birth which were very specific, we are satisfied that DC's age was appropriately proved and there is no room for reasonable doubt in that regard".

18. It was submitted that in this matter, there was no birth certificate produced as an exhibit in court. There was no age assessment report. The mother of the minor was not called to testify and there was no explanation as to why she was not sought to clear the air. The Appellant submitted that to rely on the evidence of the grandmother only as proof of age of the victim without any support evidence as to the age of Victim was in error.

19. The Appellant relied on the case of Joseph Kiema Philip v Republic [2019] eKLR (Kajiado Criminal Appeal No.17 0f 2018), where the Honourable court after quoting in approval the case of Charles Karani (Supra) noted inter alia that;-

> The age of the complainant is one of the critical ingredients of the offence of defilement which must be proved by the prosecution beyond reasonable doubt. Under section 8(1) of the *Sexual Offences Act* a person is deemed to have committed defilement if he or she does an act which causes penetration with a child. Under Section 2 (1) of the *Sexual Offences Act*, the definition of a child is the one assigned in the *Children Act*. This entails any human being of less than eighteen (18) years.

20. The onus of proving age resides with the prosecution. Mwilu J (As She Then Was) in the case of Hillary Nyongesa Vs R (Eldoret Criminal Appeal No.123 of 2000) stated that:

> " Age is such a critical aspect in Sexual Offences that it has to be conclusively proved....And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim."

21. Similarly, in Kaingu Elias Kasomo Vs Republic; (Malindi Court of Appeal Criminal Case No. 504 of 2010), the court emphasized on the importance of proving the age of the victim of defilement as the sentence imposed upon conviction depend on the victim's age.

22. The question to ponder as to how the age of a complainant can be proved to the standard required by the law was discussed in the case of Joseph Kieti Seet Vs Repuplic (2014) eKLR, H.C at Machakos, Criminal Appeal No. 91 of 2011, where Mutende, J Held as follows;

> " It is trite law that the age of the victim can be determined by medical evidence and other cogent evidence.

23. In Francis Omuroni –Vs- Uganda, Court of Appeal No.2 of 2000, it was held thus:

> " 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 other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense....."

24. It was argued that for the court to rely on a document it has to be produced as an exhibit and therefore the trial court could not rely on a marked document to proof the contents of the same. The contents of the marked birth certificate could not be relied on as prove of age of the victim. It ought to have been produced. Reference was made on the case of Mohammed Chebii Okomba v Republic [2021] eKLR (Criminal Appeal No E008 of 2020), where the court held:-

> " The question of whether a document that was marked for identification formed part of the evidence that was adduced and the weight thereof to be attached was addressed in the case of Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others [2015] eKLR. The court therein held that the mere marking of a document for identification did not dispense with the formal proof thereof. It further held that the marking of a document was only for purposes of identification and was not proof of the contents of the document and that a witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case.

> Notably, admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value. This court thus wholly associated itself with the holding in the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 Others (Supra).
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> Proof of a victim's age is a key ingredient to prove an offence of defilement. The penalty is heavily dependent on age and it is critical that a complainant's age be proven. It is trite law that the age of a complainant need not be proved by a birth certificate only as stipulated in Rule 4 of the Sexual Offences Rules, a fact that was correctly made by the State.
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> The focus in that Rule is that the age can only be proven through other documentary evidence in the absence of a birth certificate. It cannot be proven by oral evidence. If this were not so, there would be many allegations flying around which would make it difficult for courts to come to a just determination as they would have no documentary evidence to fall back on so as to make a decision.
>
> Indeed, this court took the view that proof of a complainant's age by parents or guardian and by observation and common sense as was held in the case of Musyoki Mwakavi vs Republic [2014] eKLR would be most preferable in obvious cases such as where children are of tender years. It would be risky to observe and use common sense to guess the age of older children already in their teenage years as body size could be very misleading. Proof of children in the teenage years is best proved by way of documentary evidence.
>
> The fact that the Complainant's age was shown in the PRC Form was not proof of her age. Indeed, the PRC merely addressed itself to the examination of her genitalia and it could not be deemed to have been a document that proved the Complainant's age in the absence of any other verifiable evidence. Indeed, the mere fact that the copy of the Complainant's Birth Certificate was only marked for identification remained irrelevant, inadmissible and consequently, the Trial Court ought not to have attached any weight to it.
>
> Attaching weight to the said Birth Certificate deprived the Appellant herein an opportunity to test its veracity and authenticity for the reason that he could not cross-examine the Complainant on the same. The Trial Court thus erred in law and in fact in having evaluated the contents of the said inadmissible Birth Certificate against the already admitted PRC Form. Without belabouring the point, this court thus came to the firm conclusion that the Complainant's age was not proven"

25. The Appellant submitted that based on the above cited cases, the prosecution did not produce the certificate of birth as an exhibit in court and neither did the investigating officer adduce evidence in court for purposes of cross examination on that issue so as to clear the air.

26. In addition, the Prosecution did not bother to conduct age assessment and/ or bring medical evidence to proof the age of the complainant. Equally, they would have called a medical expert and/ or the mother of the victim but this was not done.

27. In view of the foregoing, the Appellant fully adopted and reiterated the sentiments of the respective courts and submitted that in the case at hand, the age of the complainant (victim) was not proved to the require standards and as such, the conviction herein cannot stand without proof of age of the victim/ complainant the sentence.

28. Further, the defence did not have a chance to cross examine on the contents of the alleged certificate of birth. The court relied on non-existence birth certificate to make such a finding. The Appellant therefore invited the court to find that age was not proved in this matter and set aside the conviction.

29. On the issue of Penetration, the Appellant submitted that penetration was not proved in that the evidence of the alleged Victim did not disclose any penetration. On 20/3/2023 the Victim testified as PW1 where she denied recording any statement and maintained that she was forced to record lies. The prosecution stood her down to seek direction on 25/4/2023 the prosecution applied to withdraw the matter under section 40 since the complainant could not link the Appellant to the case. The court declined the said withdrawal.

30. That PW1 testified again on the said date where she said that the police bit her. She told the court the doctor slapped her and told her to agree to be examined. she said she was not comfortable being examined. On cross examination by the Appellant, she told the court that the Accused never asked her to be his friend. On 25/9/2023 shockingly after the complainant had already testified the prosecution told the court that the Complainant was stood down and prayed for counselling before further action. On the said date the complainant was recalled and she told the court that whatever she wrote she was beaten by the police and it was her grandmother who was saying the issues.

31. That on 16/10/2023 the victim was recalled again were she testified that on 31/10/2023 she went to Salvation Army Church with other youths and she reiterated that she never told any police officer her statement. The prosecution declared her as a hostile witness and was allowed to cross examine her. She testified that on that day 16/12/2022 she did not go to the boma of the Appellant and she did not record any statement and at night she remained at home and in the next morning she was at church not at the accused person`s Boma. She said that in the statement that had been recorded it was alleged that she was at Appellant's home and they had sex but it was not true.

32. She knew the Appellant as her school mate. She told the court that she was not found at the Appellant boma. She told the court that she has been staying with her mother and she did not talk to the Appellant and the Appellant was in the same group discussion with her and they have never been boy or girl friend. The witness statement of the victim/complainant was marked as PMF5 and it was not produced.

33. That cross examination of the complainant was done on 17/10/2023 by Mr. Kyalo Counsel for the Appellant where the complainant told the court she was examined on 3/1/2022 to establish whether she was defiled and she was forced by her grandmother for the said examination she told the court that the signature on the statement is not hers and she doesn`t know the doctor. It was also her evidence that she had slept with many men. From this evidence the complainant did not testify of any penetration by the Appellant despite efforts by the prosecution of the trial court and the police attempts to force her to admit penetration. The Appellant thus submitted that the complainant did not testify that she was penetrated by the Appellant herein.

34. PW2 JKM also testified and she said that there is a time she found the Appellant and the victim talking and they run away into a maize plantation and when she found the complainant at home later, she asked her about the earlier events and she kept quiet. it was also her evidence that on 24/12/2021 the victim did not sleep at home and she was brought in the following morning by a woman and she told her grandmother that she slept with a girl in Accused boma but not his house. She went to the Assistant chief and reported and she was told to home she will be called later and later she was called by the Assistant Chief Ngobeni and officers to John Mutala's Home. They found the Appellant and the Complainant and they took them to Ngoleni police station.

35. They were sent to hospital and examined as a victim of defilement and she was not explained further. On cross examination she testified that the Appellant and Complainant were arrested and summoned to Ngoleni and the parents were negligent.

36. In view of the foregoing, the Appellant equally submitted that from the evidence of PW2, she did not witness any penetration of the complainant. The minor on her part denied having engaged in any sexual activity on the material dates in as much as she admitted that she had previously slept with many men.

37. The Appellant also submitted that the medical evidence was produced by PW3, David Wambua, who stated that he is a clinician at Kathiani Level 4 Hospital where the Victim and the Appellant were taken for medical examination. She is not the one who examined the Victim but she knew the author of the P3 (medical report), the PRC form and the lab test request form which she produced in court as exhibits 2, 3 & 4 respectively.

38. With regard to the P3 form, he confirmed that nothing abnormal was detected and that no injuries were noted, the form P3 for equally confirmed that no injuries were noted on the victim private parts but brown discharge was noted. With regard to the PRC form, equally no injuries were noted on the private parts, there were normal findings, the hymen was broken and that the victim had taken bath 3 days before reporting. The PRC equally confirmed that the victim denied any penetration.

39. On cross exam, he confirmed that the lab test request form confirmed all the tests to be negative. That Appellant was also examined; they got blood and urine samples. That there was no evidence to proof recent penetration. On re-exam, he clarified among others that that some days had lapsed since the victim last engaged in sexual intercourse and that the hymen was broken long time ago.

40. The Appellant submitted that the medical evidence as highlighted herein speaks for itself. Penetration and who caused the same can only be proved by medical evidence as corroborated by other prosecution witnesses.

41. Bearing in mind that the victim (PW1) and the Appellant were taken to hospital on the same day the offence is alleged to have been done and bearing in mind that PW2 confirmed that PW1 did not get an opportunity to bath and/ or change clothes, thus, there is no proof of penetration of the minor of the fateful day or even the day before.

42. It was submitted that, it is worth noting that while defending himself, the Appellant (DW-1) confirmed that he was examined on his private parts and blood samples were taken. However, he did not receive the results therein and none were availed to court. Therefore, the only inference that can be drawn therein is that the results were negative.

43. In view of the foregoing, the Appellant submitted that there is no proof that the Appellant was involved in the alleged offence at the stated time and/or at all. That the medical evidence having failed to confirm that PW1 was defiled and/ or had carnal knowledge on the said dates and by who, then penetration as against the Appellant has not been proved to the required standards or at all.

44. That the medical evidence produced in court did not confirm any sexual activity as well as recent penetration as against PW1. In any case, the said medical evidence does corroborate the evidence of the alleged victim of defilement, who categorically denied the same.

45. Reliance was placed on the case of Julius Kioko V R. (supra) where court noted inter alia that “the medical evidence could not conclusively link the appellant to the offence”.

46. Reliance was equally placed in the Court of Appeal case of Arthur Mshila Manga V R [2016] eKLR(Mombasa Criminal Appeal No 24 of 2014. Where the court was faced with similar situation as

the one at hand and court concluded that penetration was not proved and thus the accused was set at liberty. In analysing the matter, the court stated as follows;-

> " No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the P3 form as PEX1."
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> From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM herself.

The Honorable court further noted that

> " PW1s (complainant) testimony in this regard was not specific as to the act of penetration and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. Evidence of sensory details, such as what a victim head, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases."

47. The Appellant submitted that the trial court on the issue of penetration found that although P3 form of the PRC form were produced it is observed from the said documents that the minor hymen was broken but there was no indication of when it happened as it was an old broken hymen. Therefore, from this evidence there is no evidence of penetration.

48. That under section 8(1) of the *sexual offences Act* states that "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement". "Penetration" under section 2 of the Act is defined to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person." The complainant (PW1) testified as follows in her testimony did not specify any act of penetration and her evidence of her having sex with many men does not prove that penetration took place since there is no any further evidence and details as to what actually happened, the court was invited to find that this element was not proved. Reliance was placed on the case of Julius Kioko Kivuva v Republic [2015] eKLR

> " As regards the requirement of penetration, section 8 (1) of the *Sexual Offences Act* states that:- "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement". "Penetration" under section 2 of the Act is defined to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person." The complainant (PW1) testified as follows in this regard: "The accused removed my pant and my skirt. I also had a black biker which he also removed. He did not use a condom. We had sex twice that night. We slept up to 9.00 a.m the following day" http://www.kenyalaw.org - Page 5/6 Julius Kioko Kivuva v Republic [2015] eKLR PW1's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to

establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the ability to prove a charge rest with the victim's testimony and credibility as it does in this appeal. In addition, it is also my finding that the medical evidence by PW6 was not sufficient corroboration as to the defilement of PW1, as PW1 testified that she also had sexual relations with one Festus the next day on 27/12/2012. I agree with the Appellant in this respect that in the circumstances, the medical evidence could not conclusively link the Appellant to the offence. I therefore find that the prosecution failed to prove the element of penetration beyond reasonable doubt, and it was therefore unsafe for the learned trial Magistrate to convict the Appellant on the evidence on record".

49. The Appellant prayed that this court does find that the trial court erred in finding there was penetration despite the complainant denying having engaged in any sexual activity on the material dates with the Appellant. Further, the trial court failed to find that the P3 form and the PRC form indicated that there were no injuries noted on the private parts of the victims and the victim denied penetration. The Appellant also prayed that this court does find that PW3 the doctor having found the hymen was broken long time ago this could not be basis on reaching a finding of penetration. That the medical evidence tendered in court is not sufficient to prove penetration and this ingredient of defilement was not proved as required we pray the court to quash the conviction.

50. It was equally submitted that the trial court erred to find that the Appellant was responsible for the offence when the there was no evidence to link the Appellant to the offence.

51. The Appellant further submitted that the trial court ignored the failure by the state to avail the examination report of the Appellant since his samples were taken out but no results. In fact, there was no any medical evidence linking the Appellant to the offence. It was not enough for the trial court to find the prosecution said he was responsible by relying on the facts not presented as part of the evidence but as part of investigation of interference with witnesses as follows:

> " the Complainant was an extremely hostile witness who took the stand a record 4 times who alleged as having been forced to testify and being beaten by the police".

52. The evidence adduced was that the minor was found in Appellant`s house. On the fateful day, PW2 had reported to the police who asked her to lead them to where the minor may have been and when she did, the officers found accused and the complainant in accused`s house. They were immediately arrested. They were not found doing any act but rather revising for exams. It was not alleged that they had locked up themselves.

53. The Appellant observed that in its judgment, the trial court noted inter alia that:

> " I have no doubt that accused committed the offence. Except it appears, from her demeanour, that the minor had been brainwashed into believing it was the right thing to do. In fact, the grandmother told the court that the minor was always good child, having lived with her from the time she was born. The behaviour of disappearing from home and engaging in sex, she said, came about when the accused came into her life. They were in the same school; I have no doubt about that. I believe they were revising for the school. The same way I also believe they were having sex as they had the opportunity, place and access to engage in the said activity. In other words, accused and the minor were revising for exams and also having sex with each other. So much such that the minor had became hostile and untruthful to the extent of telling the court that she was beaten by the police when she was arrested and yet that was not the case. 3 times she took to the stand and retracted the statement she recorded

at the police station. On the 4th time, when the prosecution sought to cross examine her, she unknowingly revealed that defilement had occurred. Nevertheless, the evidence as adduced are incompatible with accused`s persons innocence".

54. The Appellant submitted that this matter considered by the court was not part of the evidence adduced by PW1, PW2 and PW3 but part of investigation by the OCS on interference of the complainant which resulted to previous cancellation of the bond terms. It was wrong for the court to consider those issues since they were not part of the evidence. The OCS was not a witness. He was only summoned to avail evidence of interference of the Appellant as evidenced in his proceedings at page 16, 17,18, 19 and 20 of the proceedings. The OCS having not been a witness in, we submit that it was irregular for the trial court to rely on her findings to reach a conclusion that the Appellant was responsible for the defilement. If the OCS was a witness subjected to cross examination it would have been a different situation on whatever she presented to court. The Appellant prayed the court to find that this was an error.

55. The Appellant submitted that it was an error for the trial court to fail to find that the evidence adduced during the trial did not support the charge and the medical evidence adduced could not link the Appellant to the offence. The trial court relied on the evidence of the complainant despite being declared a hostile witness and thus unsafe to rely on the evidence without collaboration.

56. Reference was made to Section 124 of the *Evidence Act*, calls for children evidence to be corroborated by other material evidence before a conviction is made. However, the proviso thereto is to the effect that, a trial court can convict on the evidence of the victim of a sexual offence alone if it is satisfied that the victim is telling the truth and secondly it must record the reasons for such belief. (see the case of Arthur Mshila Manga (supra)

57. The Appellant sought to establish that the evidence and character of the minor (PW1) as portrayed in court connote an image of a person whose evidence is wanting. The Victim/ Minor's' evidence (PW2) is wanting in many aspects. From the evidence that she adduced in court, she painted a picture of a witness who is not worth relying without corroboration evidence in support. To start, the history of her case from its inception speaks volume as the court had to even summon the police officers to come and testify in court and clarify some issues.

58. On the other hand, when PW1 (victim) stood on the dock, she categorically denied having been defiled and equally denied the written statement that had been allegedly recorded at the police station.

59. This prompted the prosecution to declare her a hostile witness and there after they proceeded to cross examine her under Sec 161 of the *evidence act*. She denied having been sent by her grant father to charge a phone, she denied having visited the home of Mutala (the Appellant) on the fateful day and stated that she was at a church seminar, she equally denied having escaped from home in that she went back home at 6:00pm and found her mother and grandparents.

    It was also her case that on 01/01/2022 she did not visit the accused home but rather she went to church. It was her case that the Appellant was just a school mate. PW1 equally stated that she did not write any statement at the police station and the signature thereon was not hers. She was also categorical that she has slept with many men and that having sex mean inserting a penis in a girl's vagina. This evidence of the complainant being declared a hostile witness cannot be relied without collaboration

60. That the trial court in relying on uncollaborated evidence of PW2 grandmother to the victim was an error. PW2 (JKM) who is a grandmother to the victim gave a contradicting story to that of the minor (PW1). She averred PW1 left on 31/12/2024 and she did not come back. She also alleged that on another day she found the accused with PW1 (sarafina) in their house just talking and doing nothing,

later they went to shamba, that sarafina (PW1) told her that she slept in the house of another girl and later came home and gave out the phone she had taken to charging. It was also her case that when sarafina (PW1) came back home the following day, she went to school and did not come back and she did not know where she slept. That later on police went and found sarafina (PW1) at the home of the accused and they were arrested. It was also her evidence that sarafina (PW1) is around 15 year old as she was born in the year 2007.

61. It is also worth noting during cross exam, the dates which PW2 alleged that PW1 had gone to school and did not come back home (that is on 1st, 2nd and & 3rd January, 2022) came under deep scrutiny since it is well within our knowledge that Secondary schools could not have re-opened by then in that they ordinarily open in the 2nd week of January this evidence was untruthful and the trial court did not record in the proceedings why it was satisfied that Pw2 was telling the truth.

62. In the Court of Appeal case of Arthur Mshila Manga V R [2016] eKLR (Mombasa Criminal Appeal No 24 of 2014, the court quoted in approval the case of Ndungu Kimani V. Republic [1979] KLR 282 where the Court aptly observed:-

> " The witness in a criminal case upon whose evidence is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore unreliable inordinate witness which makes it unsafe to accept the evidence."

63. The Appellant submitted that there are fundamental disparities in the evidence of the minor/ victim regarding material facts in this case. The evidence of PW1 vis-as vis the evidence of PW2 do not corroborate. Be as it may, it was submitted that the evidence of the said civilian witnesses did proof the present charges to the required standards and we pray the Honourable court to find so.

64. The Appellant argued that the trial court failed to find that the prosecution did not avail crucial witness especially the investigation officer to collaborate the prosecution evidence and a negative inference on why they were not called to testify ought to be drawn.

65. In this matter after the doctor testified PW3 at page 36, 37 to 39 of the proceedings that is at page 75 of the record of appeal. The prosecution sought for an adjournment to avail the investigating. On the said dated 16/4/2024 the prosecution sought for another adjournment to /18/6/2024, still the case did not proceed. On 15/10/2024 the prosecution was still not ready and their case was closed the investigating officer, the arresting officer, the OCS Kathiani Police Station and the mother to the Victim did not testify despite being assigned duties by the trial court. These were crucial witnesses who would have produced exhibits and given light to issues in the case. The trial court despite the said issued be raised in the submissions of the Appellant which are at page 17 to 36 of the record of appeal did not consider the said issue.

66. The Appellant cited the case of Bukenya & Others vs. Uganda (1972) EA 549, where the Africa Court of Appeal held that:-

> " The prosecution must make available all the witnesses necessary to establish the truth, even if their evidence may be inconsistent. That the court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case; where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

67. On the foregoing case, these were crucial witnesses whom who ought to have been called to corroborate and fill the gaps in the prosecution case.

68. The Investigating officer (I.O) did not adduce his/her evidence despite several adjournments. The arresting Officers did not equally testify in the main case so as to clarify the circumstances and the state in which they made the arrest and how. Equally the mother to the victim did not feature anywhere. It was not alleged that her whereabouts were unknown.

69. No plausible reasons were given as to why these crucial witnesses were not called to adduce evidence in court. Judicial precedents have qualified that when the prosecution decides not to call a crucial witness without any justifiable and reasonable cause it runs the risk of the court presuming that had that evidence been produced, then it would have been adverse to the prosecution.

70. Reliance was equally placed in the case of Mohammed Chebii Okomba v Republic [2021] eKLR (Supra) where the Honourable Court noted inter-alia that ;-

> " ..... The failure by the Prosecution to call at least one arresting officer or investigating officer to corroborate the Complainant's and PW 2's evidence on how the Appellant was arrested dealt a fatal blow to the Prosecution's case. The fact that they were not called as witnesses during trial caused this court to draw a negative inference on why they were not called to testify.
>
> In the absence of the arresting and investigating officers adducing evidence to corroborate her evidence and that of PW 2, this court was not completely certain that the Appellant penetrated the Complainant as she had contended and/or that the facts of the case were as she and PW 2 had narrated to the Trial Court."

71. The Respondent submitted that it can fairly be inferred that their evidence would have been adverse to that of the prosecution and that is why they were not called to adduce evidence since this is a made-up case suspect of malice. The Appellant invites the court to find as such.

72. The Appellant submitted that the trial court errored in considering extraneous factors and evidence which were not tendered during trial in convicting and sentencing the Appellant. The court also relied on documents which had not been produced as exhibits. In this matter the state applied to produce the witness statement of the complainant at page 26 and 27 of the proceedings which are at page 62 and 63 of the record of appeal the court admitted as evidence the witness statement of the complainant however the same was never produced in court as part of the evidence the court relied on this witness statement in convicting the Appellant despite the same was not produced as part of the record . Also, the court relied on birth certificate of the complainant which was not produced as exhibits on reaching a finding that the accused was responsible the court relied on extraneous matters which were not evidence to reach a finding that the Appellant was responsible. The trial court also relied on the information given by the OCS who was not a witness and whom the defence did not get an opportunity to cross examine. These issues were extraneous since the people who gave this information were not witnesses. The main witnesses who were cross examined by the defence were only three, PW1, Victim/ Complainant, Pw2 grandmother and Pw3 the doctor. Thus, any other evidence given outside there evidence ought not have considered and we pray the court to find as such and set aside the conviction.

73. The Appellant submitted that the trial court did not consider the Appellant's defence and mitigation in the judgment which is at page 87 to 92 of the record of appeal there is no were the trial court considered the defence of Appellant and why it was not acceptable the court only enumerated the evidence of PW1 and there was nowhere the court found that the evidence was not truthful and why it was not

considered. There is nowhere in the judgment the court considered submissions of the accused in its judgment. The submissions were filed and are at pages 17 to page 36 of the record of appeal they were not considered. On the issue of the trial court failure to observe the issue of minimum sentence being unconstitutional was not also considered.

74. It is was submitted that the Appellant gave a plausible defence. He did acknowledge that indeed he knew Sarafina (the victim) as they schooled together at Ngiini Secondary school in 2022 when he was in form 3 and the victim was in form 2. They were in day school.

75. It was his evidence that on 03/01/2022, the victim came to their home. They were revising together and doing the homework which they had been given when the school closed as the schools were due to open on 04/01/2022. That around noon, policemen came at their home. They found the door open and arrested them. They did not get an opportunity to change clothes or even bath. They did not resist arrest and were taken to Kathiani Police Station and then to Kathiani Hospital where each was taken to a separate room.

76. On his part, the Appellant equally confirmed that he was examined on his private parts and blood samples were taken. He confirmed that he has never received the results. The Appellant denied having committed the offence complained of and prayed to be acquitted.

77. The court did not analyse the evidence that was given by the Appellant and why the court did not belief on the same. This was an error. Further submissions by the Appellant which are at page 17 to page 36 of the record of appeal were not considered and the Appellant invited this court to find this was an error and overturn the conviction and sentence of 20 years of imprisonment.

Respondent's submissions

78. The Respondent opened its submissions by observing the Character of the Victim during the entire proceedings of the case.

79. It was submitted that the victim PW1 insisted that she was born in the year 2003 and not the year 2007 as the birth certificate indicated a statement she maintained throughout her evidence. (see record of appeal page 45, 47). Further the victim throughout her testimony maintained the fact that she was forced by her grandmother to write her statement. She stated thus:

> " I did not record any statement.... she told me to lie.... I was forced to record lies... ' (see record of appeal page 45, 52) She further stated that it's her grandmother who was saying the issues (see record of appeal page 51) She stated that she was taken to the police station by PW2 and she did not sign the statement. She denied the averments on her statements and denied that the Appellant defiled her. The victim was stood down several times including being taken for counselling and remanded at a children's home but she still maintained her statement that the statement was not written voluntarily and she did not sign her statement. (see record of appeal page 63). The victim also stated that she was beaten by police which the police denied (see record of appeal page 51 - 52). The prosecutor then made the application to have the declared as a hostile witness and went ahead to cross examine her (see record of appeal page 59). She denied having sex with the Appellant (see record of appeal page 60) It was note-worthy that the victim on cross examination by the Stated when she was declared a hostile witness, she stated that the Appellant is not the first man for her to sleep with. She had slept with many others... " (see record of appeal page 60)

80. The Respondent the proceeded to submit on the ingredients of the Offence of Defilement and submitted as follows:

> "To prove the offence of defilement, the ingredients that need to be proved are age, penetration and the identity of the perpetrator. In this matter the essential ingredients of defilement were not proved and not adequate to prove the offence beyond a reasonable doubt".

81. The Respondent proceeded to submitted on the ingredients of defilement as hereunder.

age

82. The Respondent cited the Court of Appeal in Mwalango Chichoro Mwanjembe v Republic (2016) eKLR where it was held that:

> "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 documentary 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" (emphasis mine)

83. It was submitted that the evidence on record is that under oath the victim PW 1 indicated that she was born in the year 2003. The birth certificate indicated PW1 was born in the year 2007. She stated that she was born on 30/11/2003 and not born on 30/11/2007 (see record of appeal page 45). On cross examination by the State when she was declared a hostile witness she stated she was born in the year 2006. (see record of appeal page 60) Further the birth certificate was not produced as evidence so as to allow the trial court examine the certificate as documentary evidence against the oral testimony tendered and this being a court of record, there is nothing for the court to refer to. Thus, in view of these contradictions age was not properly proved beyond reasonable doubt.

penetration

84. The Respondent submitted that the offence of defilement is provided for under Section 8 of the *Sexual Offences Act*.

Section 8(1) provides that:

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

85. Reliance was placed on Kyalo Kioko v Republic (2016) eKLR where the court stated that the ingredients of the offence of defilement are:

> "On the first issue as to whether the Appellant was convicted on the basis of satisfactory and sufficient evidence, this Court is mindful of the ingredients of defilement which were highlighted in Charles Wamukova Karani vs Republic. Criminal Appeal No. 72 of 2013 as follows: The critical ingredients forming the offence of defilement are:
>
> a. age of the complainant,
>
> b. proof of penetration, and

c. positive identification of the assailant.”

86. The Respondent submitted that the testimony of the victim to prove this ingredient is critical. However, in this case the victim PW1 failed to testify as regards penetration. She held it down in her evidence that the Appellant did not defile her and that there was no penetration. (see record of appeal page 60, 73) She further stated she has slept with many other men. (see record of appeal page 60) The testimony of the doctor was also not conclusive to prove this ingredient. The record reflects that the victim PW I refused to be examined. She stated that when she went to the doctor, the doctor slapped and told her to agree to be examined. She told him she was not comfortable being examined... " (see record page 47). The Respondent questions if this meant she was forced to be examined? It also begs the question on the accuracy of the results and where the results came from if she declined to be examined. Further the clinical officer PW3 is not the one who examined her thus is not able to testify as to the demeanour of the victim when she visited the hospital and his evidence is limited to the production of the medical documents. Further the medical documents do not show any signs of penetration and she was seen within two days of happening of the alleged offence. The evidence on penetration was not corroborated. The evidence was not safe for court to arrive on a conclusion that there was penetration.

87. The evidence against the Appellant was weak to sustain a conviction beyond reasonable doubt. The Prosecution on realising the problem sought to withdraw the matter under Section 40 of the Sexual Offence Act but the Trial Court declined however the record does not give reasons as to why the Trial Court declined. (see record of appeal page 46) The intention of the Prosecution was to terminate the case to allow for further investigations into the conduct of the victim PWI and also to save the Trial Court's time.

Analysis and determination

88. I have carefully perused the entire record of appeal herein, the proceedings and the parties' submissions. I am reminded of the duty of the first appellate court which was clearly spelt out in the case of OKENO V.REP 1972 E.A. 32. The Court of Appeal stated that:

> “An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) 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 (Shantilal M Ruwala v R [1957] EA 570). 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; it must make its own findings and draw its own 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, see Peters v Sunday Post [1958] EA 424.”

89. Having highlighted the trial court's proceedings, the judgement and the parties' submissions more so the Respondent's submissions, my attention is drawn to the submissions by the Respondent that on the ingredients of the Offence of Defilement and submitted as follows:

> “To prove the offence of defilement, the ingredients that need to be proved are age, penetration and the identity of the perpetrator. In this matter the essential ingredients of defilement were not proved and not adequate to prove the offence beyond a reasonable doubt”.

90. Clearly, the above amounts to the Respondent conceding to the appeal on the basis that the essential ingredients of defilement were not proved and not adequate to prove the offence beyond a reasonable doubt.

91. Accordingly, having considered the Appellant's and State's submissions and bearing in mind the gaps and missing evidence to link the Appellant to the victim's defilement on the material date as was indicated in the Charge Sheet , this court is persuaded to find, as the State and the Appellant had contended, that the Prosecution had not proved its case to the required standard, which was, proof beyond reasonable doubt. This court therefore finds and hold that the State is justified in conceding to the Appeal herein.

92. The upshot is that, the conviction of the Appellant is quashed and the sentence that was meted upon him by the trial court is set aside as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

93. Orders accordingly. This file closed

JUDGEMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 5TH FEBUARY 2026

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 5TH FEBUARY 2026

In the presence of: