



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mutia v Republic (Criminal Appeal E091 of 2025)  
[2026] KEHC 1615 (KLR) (12 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1615 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E091 OF 2025  
WM KAGENDO., J  
FEBRUARY 12, 2026**

**BETWEEN**

**JOHNSTONE MUTINDA MUTIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment and sentence of the magistrate's court at Mombasa in MCSO No. 67 of 2019 delivered on 23rd July 2025 by Hon G.A Olimo)*

**JUDGMENT**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* of 2006. The particulars of the offence are that on diverse dates between 28/6/2019 and 30/6/2019, at [particulars withheld] area in Changamwe sub-county, the accused intentionally and unlawfully caused his penis to penetrate the vagina of E.A a girl child aged 11 years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars are that on diverse dates between 28/6/2019 and 30/6/2019, at [particulars withheld] area in Changamwe sub county, the accused intentionally and unlawfully caused his penis to penetrate the vagina of E.A a girl child aged 11 years.
3. The appellant was convicted on the main count and sentenced to serve life imprisonment.
4. The appellant was not satisfied with the judgement of Hon G.A Olimo (CM) in the Magistrate Court at Mombasa S.O Case 67/2019 and thus sought this appeal.
5. The appellants' grounds of appeal are summarized as follows;
  - i. That the learned magistrate erred in law and fact in fact by convicting the appellant in contravention of his right to a fair trial under Article 50(2)(j) of *the Constitution* by failing



to ensure the appellant was adequately informed of his right to legal representation, thereby occasioning a miscarriage of justice.

- ii. The learned trial magistrate erred in law and in fact by relying on the uncorroborated testimonies of PW1 and PW2, which were inconsistent and contradictory, particularly regarding the dates, amounts of money given, and the sequence of events, thereby failing to meet the threshold of proof beyond reasonable doubt.
  - iii. The learned trial magistrate erred in law and in fact by giving undue weight to the prosecution's evidence while dismissing the appellant's defense which raised a credible alibi and alleged a frame-up due to a dispute involving the complainant's mother, without requiring the prosecution to disprove it.
  - iv. The learned trial magistrate erred in law and in fact in finding that penetration was proved beyond reasonable doubt, despite the medical evidence (p3 form) showing no bodily injuries and normal genital parts except for a broken hymen, which was not conclusively linked to the appellant.
  - v. The learned trial magistrate erred in law and in fact by failing to consider that the identification of the appellant was unreliable, as it relied solely on the testimonies of PW1 and PW2 without independent corroboration, and the circumstances of daytime identification were not sufficiently scrutinized.
  - vi. The learned trial magistrate erred in law and in fact by overlooking the prosecution's failure to call material witnesses, such as the neighbor Francis or the accused's companion, whose absence prejudiced the appellant's right to a fair trial.
  - vii. The learned trial magistrate erred in law and in fact by misapplying the provisions of Section 8 (1) as read with Section 8(2) of the [Sexual Offences Act](#), failing to consider that the prosecution did not establish all elements of defilement, particularly the identity of the perpetrator.
  - viii. The learned trial magistrate erred in law and in fact by giving undue weight to the substandard investigation, which failed to explore the alleged dispute over the food kiosk or verify the appellant's claim of a frame-up and demand for a bribe by the complainant's mother.
  - ix. The learned trial magistrate erred in law and in fact by failing to consider the possibility of fabrication in the complainant's accounts, given their admission of accepting money and delaying reporting due to fear, which undermined their credibility.
  - x. The learned trial magistrate erred in law and in fact by convicting the appellant despite the prosecution's failure to disprove the appellant's defense that the case was motivated by a business dispute, thereby occasioning a miscarriage of justice.
6. The duty of this court as a first appellate court is well settled in the case of *Okeno v Republic* [1972] EA 32 at 36 where the court 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 (*Pandya v Rep* [1957] EA 336 and to the appellate court's own decision on the Evidence. The first appellate must itself weigh conflicting evidence and draw its own conclusions. (*Shentilal M. Ruwala v R* [1957] E.A 570. It is not the function of the first appellate court to merely scrutinize the Evidence to see if there was Some evidence to support 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



finding 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 witnesses, See *Peters v Sunday* [1958] E.A 424.”

### **Prosecution’s case**

7. PW1 EA (minor) the complainant herein testified that she is aged 11 years. She stated that on 25/6/2019 it was on midterm and she went to visit her friend called BA. That they were seated outside their house. The accused and another person requested them to take them to a cocacola kiosk which they agreed. One had a rope and the other one had a blue masking tape. As they were walking the accused held the victim’s hand and the other man held BA.
8. They took them inside a [particulars withheld ] area in one of the houses. The other person opened the door. Once inside they were made to lie on the bed. Accused person forcefully removed her dress and pant. BA was also undressed. The men had sex with them. After sex they were released. She was given 200/- by the accused. BA was given 100/-. She did not tell her mother. She used the cash to buy snacks.
9. The following day while playing football she saw the accused person who asked her to call B.A. They were given ksh. 300/- and they left with them to the same home. After they had done they were released but she did not tell her mother for fear that she will beat her. BA’s aunt found BA with cash. Upon enquiring BA told her aunt everything. They went to victim’s home that’s when EA narrated the ordeal to her mother. She was taken to Changamwe police station then to port-reitz hospital. She was examined and later a p3 form, treatment notes, PRC form were filled.
10. PW2 BA (minor) stated that she is class 4 pupil at Changamwe primary school. That on 28/6/2019 they were seated outside their house. Two men asked them to take them to a shop. They agreed. They took them to a home in [particulars withheld ] area. The accused opened the door. While inside the house the two men forced them to have sex. They men ordered them to undress and lie on bed. They had sex with them then asked them to leave.
11. BA was given ksh. 1,000/- and E.A was given ksh. 500/-. When she got home her grandmother asked her about the cash. She called her aunt who lives in Bamburi who after enquiries, BA narrated the whole incident to her aunt. The following day while playing football the two men came again and took them to the same house and had sex with them. BA was given ksh. 200/- and EA was given ksh. 300/-. BA’s aunt took her to the police.
12. PW3 JA the victim’s mother stated that her daughter was born on 1/4/2008. On 6/7/2019 at 6.00pm a neighbor called E came with her child at J house. She inquired where her daughter was at that moment. When her daughter came she informed JA that BA had been found with ksh. 1,000/- when asked she informed her that it was 2 men who had given her the money. E then told JA that a man friend gave her the money and that EA knew that’s why E came to J house.
13. JA asked her daughter who informed her that there are two men who gave them the money, one is Mutinda and the other name she couldn’t remember. They reported the matter to Changamwe police station. He did not know the accused and they had never met.
14. PW4 doctor Mohamed Hassan a doctor at Portreitz hospital who was stood down because he was not the examining doctor.
15. PW5 Joshua Randila Regil clinical officer at Portreitz stated that the victim visited their facility on 6/7/2019. She was 11 years old. She was accompanied by her mother and complained of sexual violation. Upon interrogation she stated that it had happened 3 times. The last one was on 30/6/2019.



Upon asking why they took long he was informed that the minor started experiencing pain while urinating and that prompted her to inform her mom who in turn brought her to hospital.

16. On examination there were no injuries on the body but on the genital only hymen was not intact but the other parts were normal/no injuries. Lab investigations VDRL was negative. Analysis test was negative. HIV test was negative; pregnancy test was negative. The minor was given medication and counseling was done. PRC form was filled on 6/7/2019.
17. The PRC form confirms she had last sexual intercourse on 30/6/2019. She narrated that the perpetrator would give her money. There were no injuries on the body. On genital there were no injuries only that hymen was not intact. She had already been prior to seeking treatment. The document was signed on 6/7/2019.
18. P3 form was filled on 18/7/2019 it was noted she visited the facility wearing clean clothes. She was in fair general condition. The body was normal as noted in PRC and clinical notes probable type of weapon is male organ. Nature of defense is defilement. The victim was 11 years old. The hymen was not intact. There was no discharge. The p3 filled and signed on 18/7/2019.
19. PW6-118091 PC Jemima David of Changamwe police station testified that she is the IO. She took over the file from PC Edna who was transferred to Baharini police Station. She established that the accused met the complainant who was in company of her friend. Accused lured the children purporting to take them to coca-cola shop. He instead led them towards [particulars withheld]. They proceeded to a double roomed house where the accused furably defiled complainant and gave her cash. The first incident he gave her ksh. 200 and subsequent encounter he gave her ksh. 300/-. From her birth certificate the minor was born on 21/3/2008.

#### **Defence case**

20. DWI Johnson Mutinda Mutia the accused person testified under oath that he was employed as a driver. He used to do deliveries. On the day of the arrest, he had gone to check on his cousin's business in Changamwe. While at the hotel he saw a female individual approaching with 2 kids. The children bought chapatis and left. Shortly a pro box pulled up at the hotel and 4 occupants (officers) got out and arrested Joshua Kyalo. He was also arrested on allegations that they were selling food without a medical certificate.
21. Upon arrival at the police he met the two children after he alighted and the children alleged that they were their wives for six months. He called Ndunda who came and realized that Ndunda had a pending dispute with the children's mother concerning ownership of kibanda.

#### **Analysis and Determination**

22. Section 8 of the *Sexual Offences Act*, 2006 is captured in the following terms in creating the offence and punishment for defilement;

“ 8. Defilement

1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.



3. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
  4. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”
23. Section 11 (1) of the [Sexual Offences Act](#) provides for the offence of an indecent act with a child in the following terms;
- “ 11. Indecent act with child or adult
- (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”
24. The crucial elements that need to be proved for a crime of defilement to be inferred can be drawn from the wording of Section 8 of the [sexual offences Act](#). The prosecution needs to prove beyond reasonable doubt that; -
- i. There was an act which causes penetration (of the victim’s genital organs by the accused’s genital organs)
  - ii. The age of the victim (must be a child)
  - iii. Positive identification of the accused as the person who committed the act.

### **Penetration**

25. Section 2 of the [Sexual Offences Act](#) defines it as the partial or complete insertion of the genital organ of a person into the genital organs of another person. in this case it is not in dispute that when the minor was examined her hymen was found to be broken. This clearly indicate that the minor had sexual intercourse.
26. Upon examination the PRC form shows that the minor had sexual intercourse on 30/6/2019 and the examination was conducted on 6/7/2019. As per the report she was in pain and that is why she was taken for medical examination. The hymen was found to be broken.
27. In the case of *Bassita Hussein vs Uganda*, supreme Court Criminal Appeal no. 35 of 1995, the court held: -
- “ the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence.”
28. In the above foregoing, I find that the evidence of the victim and that of the Doctor was consistent and sufficient to prove the element of penetration thus there is no reason to disturb the finding of the trial court. I affirm that penetration was proved beyond reasonable doubt.



### **Age of the victim**

29. Proof of age is important in a sexual offense. In *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that: -

“Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

30. The record shows that the birth certificate of the complainant indicates that she was born on 21/3/2008 which meant that the victim was 11 years on the day of the alleged defilement. This court agrees with the trial court that the age of the victim was sufficiently proved beyond reasonable doubt.

### **Positive identification of the assailant**

31. Both the complainant and PW2 testified that they knew the perpetrators of the incident. They alleged that they were taken to a Swahili house located in [particulars withheld] and they were defiled together. From the evidence EA stated that the other person is the one who opened the door for them while BA stated that it was the appellant who opened the door for them. EA stated in her evidence that the accused person forcefully removed her dress and pant while BA stated that they were ordered to undress and lie on bed.

32. After the alleged defilement, on the first time, EA stated that she was given ksh. 200 and BA was given ksh. 100 which she bought snacks. The 2nd time she stated that they were given ksh. 300/-. BA in her evidence stated that she was first given ksh. 1,000/- and EA was given ksh. 500/- and subsequently she was given ksh. 200 and EA given ksh. 300/-.

33. In this case the only person who can identify who the really defiled the minor is PW1 and PW2 who claimed to have been present when the incident occurred. However, the line of story narrated by the 2 minors is not concrete so as to believe them. I find that the evidence of the 2 minors is not solid to positively identify the appellant as the perpetrator of the offence.

34. Having failed to prove the last limb of the offense, I find that the prosecution failed to prove their case to the required standard and therefore the appellants appeal is merited.

35. Consequently, the Appellant is hereby set at liberty unless otherwise lawfully held.

36. It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF FEBRUARY 2026.**

**WENDY KAGENDO JUDGE**

In the presence

The Appellant in person MR Ngiri For The State Bebor Court Assistant

Signed By/for:

**HON. LADY JUSTICE WENDY MICHENI**

