Mugendi v Republic (Criminal Appeal E019 of 2025)
[2026] KEHC 2078 (KLR) (24 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2078 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E019 OF 2025

SM GITHINJI, J

FEBRUARY 24, 2026

BETWEEN

ELIPHAS MUGENDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. EMB, the Appellant herein was charged in the Lower Court with a main count of defilement contrary to Section 8(1) as read with Section 8(4) of the *sexual offences Act* No. 3 of 2006.

2. The particulars of this offence are that in the month of October, 2020 at Igonji Location in Imenti South Sub-County within Meru County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of PK, a girl aged 17 years at the time of the said offence.

3. In the alternative, he was charged with the offence of indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

4. The Particulars hereof being that in the month of October, 2020 at Igoji location in Imenti South Sub-County, within Meru County, the Appellant intentionally and unlawfully touched the vagina of PK, a girl aged 17 years, with his penis.

5. The prosecution case is that the victim herein, one PK (PW-1) was born on 10th March 2004 in accordance to her produced Birth Certificate No. xxxxxx, of which was issued on 30th January, 2023.

6. In the month of October, 2020 she was 16 years old, and was schooling at [Particulars withheld] High School, in form 3G. she was the Dinning Hall Captain. During that month, on a Sunday at around 2.10 Pm she was walking along the road. A red vehicle driven along the said road stopped when it reached her. It was driven by the Appellant herein. The Appellant was well known to the victim as he was a friend to her father. His name is EMB. He offered to take her to a place to eat "Nyama Choma".

She entered the vehicle. She was taken to Sundowner Hotel and Lodging at Igoji. They took roasted meat after which she was offered a soda. After she took the soda she was disoriented and found herself in the hotel room, number 7. She tried to scream and the Appellant restrained her. He told her that he intended to have sex with her. She resisted and he forced her into it. They had unprotected sex. After they were done he gave her 500/- for her fare back. They parted at 6.00 Pm.

7. She took a boda boda and went home. She told no one about the incident. In the month of November she missed her monthly periods. She called the Appellant and informed him. In January, she went back to school. The Deputy Principal was Dr. Mercy Kariuki (PW-1), who is currently a Lecturer at Chuka University. Due to the said pregnancy, the victim was not buttoning her skirt and was always wearing a jumper in an effort to conceal it. PW-1 noted of that and became suspicious.

8. She called her into her office in mid February, 2021. After a lengthy discussion, the victim stated that she was pregnant and the person responsible for it was Mr. EMB, alias "Mucori or Justice." PW-1 had not known the alleged culprit. PW-1 called the victim's father who went to the school. The victim was told to report to her father what happened. She did. The father was told to take her to the hospital for examination. She was taken to Chogoria Hospital where the pregnancy was confirmed. The mater was reported at Kiangua Police Station. PW-4 investigated it. He issued the victim with a p-3 form on 2/3/2021. It was taken to Kanyakine Sub-County Hospital. The victim was examined by PW-5 who filled the P-3 form. He noted her hymen was broken. Ultra sounds conducted on 1/3/2021 and 2/7/2021 confirmed that she was 18 weeks and 3 days pregnant and 33 day and 6 days, respectively. The clinical Officer concluded that there was a sexual interaction leading to the said pregnancy. The P3 form was thus filled.

9. The police started looking for the culprit. He was well known as a businessman at Kiangua market. On 7/8/2021 he presented himself at the Police Station. He was arrested and charged with the offence.

10. The complainant (victim) gave birth on 30/7/2021 to a boy child namely EM. On 6/10/2022 the Court ordered for a DNA test. The DNA was conducted by PW-3 at Nairobi Government Chemist. Buccal Cavity Samples were taken from PK , EM (child) and EMB (Appellant). The DNA profiles were analyzed and it was found that the DNA profile of the child was shared by the mother and EMB, the father. In effect it was concluded that there is 99.9% chance that the accused person (Appellant) is the biological father of the child. The report was produced as an exhibit (P- Exhibit – 7).

11. The Appellant's defence is that he's a businessman and operates a Hotel at Wamba, Samburu County. In October, 2020 he was at Wamba and not Kiangua, in Igoji. He got to Meru in January 2021 to take his child to school.

12. He had leased tea bushes from one MM, who is a brother to JMW, the father to the victim. JMW had witnessed the lease. The two brothers were chasing the Appellant's wife out of the leased tea farm. The Appellant upon getting to Meru called both of them. He urged them to honour the lease and leave his wife alone. They did not heed. The wife sued them in Case No. 302 of 2021. He produced the lease agreement as an exhibit. The matter was determined and they were forced to refund consideration. He produced the Decree document as defence exhibit.

13. He returned to wamba in February, 2021. He heard rumors that Josphat was going to frame him with a case so as to get him out of the farm. He got back in August, 2021 and was arrested.

14. He did not commit the alleged offence. He requested for DNA test. JKM who's M's Sister works at Nairobi Central Police Station. She accompanied them at Government Chemist. She went in with the Investigating Officer to meet the Doctor before the exercise. They then called JM and deliberated for about 15 minutes. Two Doctors then led them to an iron sheet structure where samples were taken.

Isaac Mwangi and JKM exchanged phone numbers with the Doctor. The Appellant raised the issue with the OCS and was told to be patient and wait for the results. He raised the issue of the land dispute and it was not investigated. He heard JKM saying she knew a doctor who was from Tharaka and will pay him for favourable results.

15. The Appellant called one witness, his employee at Wamba. She alleged the Appellant was in Wamba with her in the entire month of October and only left in January, 2021.

16. The trial Court evaluated the evidence and found the Appellant guilty of the offence in the main Count. He was convicted of it and sentenced to serve 15 years imprisonment.

17. Dissatisfied with the said conviction and sentence, he appealed to this Court on the grounds that:-

    a. The evidence of DNA was not analysed.

    b. The vendetta between the Appellant and the Uncle of the complainant on the issue of land was not weighed.

    c. Fresh DNA test need be ordered and carried out as the first one was absurd and influenced.

    d. Trial court misapprehended the evidence and arrived at a wrong decision.

    e. Clinical Officer's evidence is doubtful and inconclusive.

    f. The charge sheet is fatally defective.

    g. His defence was not considered.

18. The Appeal was canvassed by way of written submissions and both sides filed their respectful submissions.

19. A first Appellate Court must re-evaluate and re-examine all the evidence that was presented before the trial Court and form its own independent conclusion on both facts and the law.

    Section 8(1) of the *Sexual Offences Act*, No. 3 of 2006 states:-

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

20. The three core elements of the offence which the prosecution need prove beyond reasonable doubt are:-

    1. Age of the complainant. She or he must be below 18 years of age as per the *Children Act* as read with the Sexual Offence Act.

    2. Proof of penetration. The prosecution must prove the accused caused his genital organs to penetrate the genital organs of the victim.

       Section 2 of the *Sexual Offences Act* defines penetration as partial or complete insertion of one person's genital organs into another's. It need not be complete; the slightest penetration would suffice for the offence.

    3. Positive identification or recognition of the assailant.

21. As regard the first ingredient, the complainant (victim) gave evidence as PW -2 and stated that she was born on 10th March, 2004. A copy of her Birth Certificate No. xxxxxx was produced as P-exhibit -2. It shows she was born on the said date. The offence was allegedly committed in the month of October, 2020. By simple calculation she turned 16 years on 10th March 2020. In October of the said year she

was therefore 16 years old. The fact is well established beyond reasonable doubt, and there is no dispute whatsoever about it.

22. On issue of penetration, the victim who was then aged 16 years old and was a student at Thigaa High School in form 3G where she was a Dinning Hall Captain, narrated in simple vivid terms how she was lured by the Appellant into a hotel for a "Nyama Choma" feast and ended up in Hotel room No. 7 where they had sex. Though she did not explain what sex entails, it's logical to hold that a girl of her age and education level was conversant about it. The P-3 form shows there was penetration as her hymen was absent and she was pregnant.

23. Unless the contrary is established, it is reasonable inference that pregnancy ordinarily results from sexual intercourse involving penetration of the female genital organ (vagina) by the male genital organ (penis).

24. The evidence therefore establishes beyond reasonable doubt that there was penetration.

25. The 3rd ingredient, and the only one contested by the defence is that it's the Appellant who penetrated her.

26. The Victim knew the Appellant before then as he's a friend to her father. It's also not disputed that he owns a red vehicle in which he carried her to the said hotel. She knew him well and could not have made a mistake of him. The Appellant alleged he was fixed due to a Tea farm dispute of which he had with the victim's Uncle. The said Uncle is not a witness in the case and his involvement is not otherwise established, save for the mere allegation by the Appellant. The Appellant also stated that it's his wife who was pursuing the land dispute. It therefore follows that jailing the Appellant would not have resolved the dispute in favour of the victim's Uncle. I also find it unlikely that the victim's father would have used his schooling daughter and make her undergo the entire process of investigations and trial, so as to assist his brother who had a lease disagreement with the Appellant. The evidence reveals the Appellant is the real culprit.

27. Since Deoxyribonucleic Acid (DNA) evidence is not a statutory ingredient of the offence of defilement under Section 8 of the *Sexual Offences Act* No. 3 of 2006, its absence is not fatal to the prosecution case where the offence is otherwise proved by cogent and credible evidence, particularly the testimony of the complainant as is the case herein.

28. However, where it is alleged that the act of defilement resulted in pregnancy and the complainant gave birth, a positive DNA paternity analysis linking the accused person to the child constitutes strong corroborative scientific evidence directly connecting the accused to the sexual act and substantially strengthens proof of penetration and identity of the perpetrator.

29. DNA test in this case was proposed by the trial Court and supported by both sides in the trial. The outcome was not seriously challenged during cross-examination of the victim, the Investigating Officer and PW-3, who conducted it. The allegations by the Defence in his defence, were an afterthought; They are strange and cannot be true. They do not deserve an order for a second DNA process.

30. The DNA evidence when considered together with the victim's evidence, establishes beyond reasonable doubt that the accused is the one who committed the offence in the main count. He was therefore rightly convicted of the offence.

31. A charge of defilement cannot be rendered defective merely because the age of the victim is misstated as 17 years instead of 16 years. The evidence adduced establishes that the victim was a child within the meaning of the law and no prejudice was occasioned to the Appellant.

Section 8(4) of *Sexual Offences Act* provides that:-

> "A person who commits an offence of defilement with a child aged between Sixteen and Eighteen years is liable upon conviction to imprisonment for a term of not less than Fifteen years."

32. By virtue of Section 382 of the Criminal Procedure Code, no findings or sentence shall be reversed on account of an error or omission in the charge unless such error has occasioned a failure of justice.

33. In Willis Ochieng –vs- Republic (2006) eKLR .

The Court of Appeal affirmed that minor discrepancies or errors which do not occasion prejudice or miscarriage of justice are curable under Section 382 of the Criminal Procedure Code.

34. I, accordingly find the age error curable as it occasioned no prejudice or miscarriage of justice. Whether the victim was 16 years or 18 years old, the sentence provided under the law is the same, a minimum of 15 years imprisonment.

35. The Appeal therefore lacks merit and is hereby dismissed.

DATED AND DELIVERED AT MERU THIS 24TH DAY OF FEBRUARY, 2026.

S.M. GITHINJI

JUDGE

In the presence of:

1. Appellant at Meru GK Prison.

2. Ms. Adhi for the State.