



REPUBLIC OF KENYA



**Mburu v Republic (Criminal Appeal E068 of 2024)
[2026] KEHC 2196 (KLR) (19 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E068 OF 2024
ACA ONG'INJO, J
FEBRUARY 19, 2026**

BETWEEN

JAMES MWANGI MBURU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Sentencing of Hon. M.O OBIERO SPM in the Senior Principal Magistrate's Court at Kehancha MCSO NO. E018 of 2022 delivered on 14th February 2023)

JUDGMENT

- 1 The Appellant J. M. M. was found guilty for the offence of defilement contrary to section 8(1) as read with section (3) of the [Sexual Offences Act](#) No. 3 of 2006 and was convicted and sentenced to serve 20 years' imprisonment.
- 2 The particulars of the offence are that on diverse dates between the months of March 2022 and 7th day of May 2022 at [Particulars Withheld], in Kuria West Sub-County within Migori County, the Appellant willfully and unlawfully caused his penis to penetrate the Vagina of C.S.A a child aged 15 years.
- 3 The Appellant was aggrieved by the conviction and sentence and upon leave to appeal out of time being granted on 29th July 2024 he lodged his petition of appeal dated 30th July 2024 on the following grounds:
 1. That the Trial Court failed to observe that the sentence imposed was against the evidence adduced.
 2. That the Trial Court failed to observe that nothing linked him to the offense.



3. That the Trial Court failed to appreciate that the prosecution case was full of contradictions, inconsistencies and discrepancies hence unsafe to base a conviction upon.
 4. That the Trial Court erred in law by failing to observe that the prosecution did not discharge its duty beyond reasonable doubt.
 5. That the Hon. Appellate Court be pleased to serve him with a copy of certified trial proceedings to enable him erect more grounds.
- 4 REASONS WHEREFORE the Appellant prayed that the appeal be allowed in its entirety, conviction quashed, sentence set aside and the appellant be set free.
- 5 PW1 Edwin Omahe the Clinical Officer at Isebania Hospital testified that on 12/5/2022 the Complainant was brought to the hospital by her mother who reported that the Complainant had been living with a male adult from 7/5/2022 to 9/5/2022. That the last day the Complainant had intercourse with him was on 7/5/2022. PW1 produced the treatment notes for C.S.A and stated that she was in fair condition and on examining the genitalia, the hymen was broken and there was no discharge or any physical injuries. That on laboratory examination the complainant was not pregnant and PW1 concluded that it was defilement. He treated the Complainant and filled the P3 and PRC forms wherein and produced the Treatment Notes, P3 and PRC forms as Ex P, 2 & 3.
- 6 In cross-examination PW1 stated that the examination revealed the hymen was broken and he formed an opinion of defilement as the girl stated that she had been in a sexual relationship since March 2022. He also stated that he did not examine the Appellant nor investigate the matter.
- 7 PW2 PC Rosemary Anyango the Investigating Officer based at Isebania Police Station recalled that on 8/5/2022 while on duty she found that she had been assigned to investigate this matter which had been Report by the Complainant's mother. She testified that on 7/5/2022 the Complainant's mother reported that her daughter was missing and when the subject person returned home in the evening, she revealed that she was taken to Tanzania by one James Mburu who defiled her. That the complainant's mother went to the Appellant's home who was their neighbor and questioned the Appellant on the issue but he became violent and threatened her then remained with the Complainant as her mother left. The Complainant's mother informed her father who went and rescued the Complainant and she went to her sister's house. PW2 recorded the Complainant's statement and arrested the Appellant after finding out that the Appellant had defiled the Complainant on three occasions. She issued the Complainant with a P3 form and escorted her to Isebania Sub-County Hospital for treatment and age assessment. That the Complainant was examined and the doctor established that she had been defiled. Her age was assessed at 15 years. PW2 produced the age assessment Report as Exhibit P4.
- 8 In cross-examination PW2 stated that it was the Complainant who led her to the Appellant's house and she arrested him. That the Complainant confirmed she had sex with the Appellant and the medical evidence also confirmed the same. She also stated that the Complainant's mother had no grudge with the Appellant and it was the latter that threatened the Complainant's mother.
- 9 PW3 C.S.A - the Complainant herein testified that she used to go to school in Tanzania in Class Seven and the Appellant was her neighbor who used to be her boyfriend. She narrated that they first met in the month of March 2022 and both professed love for each other. That on 26/5/2022 she went to the Appellant's home during the day and they had sexual intercourse after the Appellant undressed her and also undress himself. She also stated that they had sex again in the Month of May 2022 although she could not recall the exact date. PW3 stated that there was a day she went to the Appellant's home and returned home late and her father beat her hence she ran away. That she went to Sirare with the



Appellant and the neighbors revealed her relationship with the Appellant to her mother who came and took her from her sister's home to Isebania Police Station then to the Hospital.

- 10 In Cross-examination PW3 stated that when the Appellant was arrested, she was not with him as she had gone to her sister's home for 3 days. She stated that her mother wanted to withdraw the case and that the Appellant never threatened her mother. She also stated that she never informed anyone of her relationship with the Appellant.
- 11 PW4 DMO the Complainant's mother testified that her daughter was 15 years old and that the Appellant was her neighbor. That in March 2022 when she returned home from work, she found the Complainant missing and the other children informed her that a man had taken her away. That she looked for the Complainant to no avail and the Complainant came back home at 6Pm wearing a certain jacket that she revealed belonged to Mwangi. It was PW4's testimony that she was angry and beat the Complainant who ran away and went to her sister's home and when the Complainant returned home, PW4 started searching for Mwangi. She stated that she took the Complainant to the hospital and that the Appellant went into hiding but was later arrested in his house.
- 12 In cross examination she stated that it was the Complainant who explained to her what transpired and she burnt the Appellant's Jacket due to anger. She stated that the Appellant and some of his friends who were unknown to her had been threatening her over the phone. She also stated that she had no grudge against the Appellant and that she never told him that she wanted to forgive him.
- 13 The Appellant was placed on his defense and he testified that he worked with an NGO and lived in Sirare. He said that the evidence and charges against him were false. He testified that in the months between March 2022 and May 2022 he was working between Kenya and Tanzania and that on 7/5/2022 he was at home and nothing happened. That on 9/5/2022 at around 11Pm he was at home with his mother when he heard a knock at the gate and upon opening Police Officers asked him about Mwangi then took him to his house and conducted a search then informed him that they were taking him to the police station. The Appellant stated that the next day he sent word to his father on the same and on 12/5/2022 a female officer called him into the Investigation Office where he found the Complainant and her mother who he admitted he knew and were his neighbors. That the Complainant revealed that it was the Appellant's friend that defiled her and he was asked to assist in locating the friend but he was later charged with the offence before the court. He stated that the doctor confirmed that the girl was defiled however the defilement was not on the material date. He further stated that he had a grudge with the Complainant's Mother's Sister. On cross-examination he stated that he had known the Complainant and her mother for eight months which period they were neighbors and that his mother had a case with the Complainant's mother's sister.

The appeal herein was canvassed by way of written submissions.

The Appellant's written submissions are dated 7th January 2025.

- 14 The Appellant submitted that the prosecution's evidence had misplaced facts of evidence, was completely inconsistent and was uncorroborated and contradictive in nature. He submitted that the evidence of PW1, 2 and 4 were all contradictory with regards to the dates when the Complainant went missing, her whereabouts, who she was with and what, if any, interactions that took place between the Complainant's mother and the Appellant where she was allegedly threatened by the Appellant and had to get the Complainant's father to rescue her daughter.

The Appellant also submitted that the Complainant's evidence was contradictory as she mentioned that she went to the Appellant on 26/05/2022 yet the Appellant was already in custody by then. He



submitted that the evidence of PW3 was obtained through punishment and was inadmissible in court by virtue of Article 50 (4) which provides that: -

“Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”

15 In regards to the above submissions, he placed reliance on the case of Ramkrishan Denkerai Pandya vs Republic Application No 6 of 1990 EACA 93 where it was held that it was difficult to distinguish the truth from the untruthful and between who was telling the truth and who was telling a lie where evidence was contradicted.

16 He also cited the case of Richard Aspela vs Republic Criminal Appeal No 45 of 1981 where it was held that two (2) contradictory statements could not be admitted in a court of law.

17 The Appellant submitted further that the elements of defilement namely; proof of age, proof of penetration and identification of the perpetrator were not proved beyond reasonable doubt. That the proof of penetration was by the Complainant’s verbal assertions and no medical evidence corroborated the same. He also submitted that by virtue of the major ingredient of penetration having not been proven, identification and linking the Appellant to the same became a rested case. That on proof of age, the Age Assessment report was insincere and realistic. Further to that, he submitted that the circumstances must also be considered to sustain the charge of defilement against the accused person. He cited the case of Absalom Ambaka Akila V Rep (2020) eKLR where the High Court at Nakuru observed that: -

” Section 33 of the *Sexual Offences Act* says as much, so that while we look at the three (3) ingredients, the fourth one, must be the circumstances, as evidence required to prove, whether a sexual offence is likely to have been committed in connection with the persons concerned.”

18 It was submitted that from the evidence on record, the Appellant did not compel the Complainant into an intercourse but rather it was the Complainant who narrated how she, on her own will and conscience used to visit the Appellant’s house. That as such she presented herself as the cause, enticement, motivator and drive behind all these issues and further confirmed that she was not forced into sex.

19 The Appellant also cited the case of Charo v Republic [2016] KEHC 5619 (KLR) where it was held: -

“The offence of defilement should not be limited to age and penetration. If those were to be taken as conclusive proof of defilement, then young girls would freely engage in sex and then opt to report to the police whenever they disagreed with their boyfriends. The conduct of the complainant played a fundamental role in a defilement case. One could easily conclude that the complainant was defiled after hearing her evidence.”

20 It was also submitted that the Complainant testified that the Appellant was her boyfriend and that they first met in the month of March 2022 and they professed love to each other. That she was in the relationship and enjoyed it and was in fact the one visiting the Appellant.

21 He placed reliance on the case of Charo V Republic (Supra) where the High Court at Malindi stated: -

“It is important to distinguish between law and morals. It is the law that a child below the age of 18 years cannot consent to sex. Section 8(5) qualifies the provisions of section 8(1) to 8(4)



which penalizes defilement. It can easily be concluded that it is immoral for one to have sex with a child under the age of 18 years. However, where the same child under 18 years who is protected by the law opts to go into men's houses for sex and then goes home, why should the court conclude that such a person was defiled. In my view that cannot be defilement. The complainant normally does not complain but is made to be the complainant because she is under 18 years. My view is that such a behaviour is that of an adult and not of a child. Children are not meant to enjoy sexual intercourse. Whenever they do, then that becomes the behaviour of an adult. Although the public will frown upon an adult who engages in sex with such a child, we should not forget that circumstances have changed. Young children engage in sex at very young age. This is not out of defilement.”

22 The Appellant prayed that the appeal be found to have merit and allow it in its entirety, the conviction be quashed, sentence set aside and he be released at liberty.

23 The Respondents opposed the Appeal and filed submissions dated 28th April 2025.

24 The Respondent submitted that the offence of defilement was proven to the required standard and that each of the elements namely age, penetration and identity of the perpetrator were done beyond reasonable doubt.

25 On proof of age, it was submitted that PW4 produced the age assessment for the complainant as exhibit 4 which indicated that the minor was approximately 15 years old. The case of Edwin Nyambogo Onsongo v Republic (2016) eKLR was also cited where documents and evidence to prove a victim's age in a case of defilement were outlined.

26 On penetration it was submitted that PW1 conducted the examination and recorded his findings in the P3 form wherein he concluded that there was penetration and that the minor had been defiled.

27 On positive identification it was submitted that PW3 positively identified the Appellant as the man who defiled her and stated that she knew him as her neighbor

28 On whether or not the sentence meted out by the Trial Court was harsh, the Respondents submitted that in the case of Benard Kimani Gacheru v Republic [2002] eKLR the court stated that: -

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

29 It was thus submitted that the sentence meted out to the Appellant by the Trial Court was sufficient given the circumstances of the case.

30 In conclusion the Respondents urged the court to find that this appeal lacked merit and dismiss it as the prosecution proved their case beyond reasonable doubt.



Analysis and Determination

31 In a first appeal, the duty of the court was stated in *Mark Oiruri Mose vs. R* (2013) eKLR thus;

“... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”

32 Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issue for determination are: -

1. Whether conviction was against the evidence.
2. Whether prosecution evidence was inconsistent, uncorroborated, and riddled with contradictions and / or discrepancies.
3. Whether Article 50(4) was violated by obtaining evidence under duress
4. Whether defense that this was “consensual relationship” was considered.
5. Whether the defense of frame-up was plausible
6. Whether the sentence meted out was manifestly harsh and excessive in the circumstances of the case.

33 On whether conviction was against the evidence and whether the ingredients of the offence of defilement were not proved beyond reasonable doubt, Section 8(1) of the Sexual Offence Act No. 3 of 2006 provides that:

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

34 In this regard, the offence of defilement is anchored on three (3) main ingredients namely; (1) The Age of the victim, (2) Penetration, and (3) The Proper Identification of the Perpetrator as was established in *George Opondo Olunga v Republic* [2016] eKLR.

35 On proof of age the Court of Appeal in *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010 (UR) stated that:

36 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.”

37 Likewise, the Court of Appeal in *Edwin Nyambogo Onsongo vs Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

... 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 documents, 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. We think



that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”

38 PW3 testified and told the Trial Court that she was 15 years old and in class 7 in Tanzania. PW2 took the Complainant for examination, treatment, and Age assessment at Isebania Sub-County hospital. She stated that the Age Assessment Report showed that the Complainant was 15 years old at the time of the incident and produced the Age Assessment Report as Exhibit 4. The Production of the Age Assessment Report Corroborated the evidence of PW3 that she was 15 years old and the Appellant's submission that the Age Assessment report was insincere and realistic does not hold water.

39 On proof of Penetration, Section 2 of the *Sexual Offences Act* defines penetration as- the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

40 In *Mark Oiruri Moses V R* [2013] eKLR when the Court of Appeal stated thus:

Many times the attacker does not fully complete the sexual act during commission of the sexual act. That is the reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.

41 In *Erick Onyango Ondeng v Republic* [2014] eKLR where it was held:-

In sexual offences, the slightest penetration of female sex organ is sufficient by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen is ruptured.

42 PW3 narrated that she first met with the Appellant in the month of March 2022 and both professed love for each other. That she went to the Appellant's home on various occasions and they had sexual intercourse including the Month of May 2022 although she could not recall the exact dates. Her evidence was corroborated by that of PW1 the Clinical officer who examined her and noted that the hymen was broken and concluded that it was defilement after the Complainant said that she had had been in a sexual relationship with the Appellant for a while. He filled the P3 and PRC Forms with the same information and presented the same in court as Exhibits 2 and 3. The Appellant's claim that the proof of penetration was by the Complainant's verbal assertions and no medical evidence corroborated the same is thus unfounded and not tenable.

43 In *Kassim Ali v Republic* *Kassim Ali v Republic* [2015] eKLR Criminal Appeal No. 84 of 2014 the court held:

Court of Appeal at Malindi

44 The absence of medical evidence does not necessarily negate a conviction if the evidence on record is otherwise sufficient to prove penetration.”

45 Under Section 124 of the *Evidence Act* the complainant's testimony can suffice to sustain a conviction in the absence of medical evidence provided the Trial Magistrate believes such evidence and gives reasons why he/she believed the evidence. Penetration was therefore proved beyond reasonable doubt.

46 On Identification of the perpetrator it was observed in *Stephen Kimari Gathano v Republic* [2022] eKLR where the court stated that:

It bears repeating that the Appellant was a person known to the complainant. I do not find any element of mistaken identity of the Appellant as the person who penetrated her genitalia. She was categorical it was Mzee was Purity- She knew the accused as such.”



- 47 PW3 the Complainant clearly and repeatedly named the Appellant as her boyfriend and the person she had sex with on several occasions. PW4 knew the Appellant as a neighbor and linked the complainant's disappearance to him. The Appellant confirmed during his cross examination and stated that they had been neighbors for 8 months. PW2 testified that PW3 led him to the Appellant's house and he was arrested. PW2 also stated that it was the Complainant who led her to the Appellant's house. The Appellant was positively identified by PW3 as the perpetrator, arrested and charged with the offense herein. The fact that PW3 mentioned the date 26/5/2022, when the Appellant was already in custody was clearly a narrative slip by a minor as the rest of her evidence places events in March and early May. Such a minor date inconsistencies are not fatal unless they go to the substance.
- 48 The contradictions in the evidence of PW3 & 4 as to whether PW3 was threatened relate to post-incident behavior and not identity of perpetrator.
- 49 The Appellant's claim that the complainant mentioned his friend as the perpetrator is not corroborated in any prosecution testimony. The Appellant introduced it only in defense and is therefore an afterthought and has to be treated cautiously.
- 50 The Trial Magistrate prior to taking evidence of the minor subjected her to voir dire examination and found she was competent to be sworn. He found that the Complainant was firm that the Appellant was her boyfriend and they had sexual intercourse on several occasions and he was convinced that her evidence was truthful. Section 124 of the Evidence Act allows conviction on the sole testimony of the complainant, if court believes she is truthful.
- 51 PW3's testimony was clear and consistent on the identity of the Appellant, despite minor peripheral inconsistencies. This court therefore finds that the Appellant was positively identified and no reasonable doubt arises from the record.
- 52 On whether, the Prosecution's evidence was inconsistent, uncorroborated, and riddled with inconsistencies, the Appellant pointed variations on dates of disappearance; where PW4 found the child and whether PW4 was threatened as well as the complainant's mis-statement of the date "26/5/2022".
- 53 For this ground to succeed the contradictions must be material, and go to the substance of the charge such as to create reasonable doubt in the mind of the court.
- 54 The issues raised by the Appellant to be contradictory and inconsistent are peripheral and do not touch on whether sexual intercourse occurred; with whom the sexual intercourse took place and whether the complainant was a minor.
- 55 In *Ramkrishan Pandya and Richard Aspela* [1957] E.A. 336 the Court of Appeal of Eastern Africa held that not every contradiction or inconsistency is fatal to the prosecution case. The court must examine whether the contradiction is minor or whether it goes to the root of the charge, affecting the credibility of the witness or the substance of the case. It is only material contradictions — those touching on essential elements — will weaken or destroy the prosecution's case. Trivial variations are expected due to human recollection and do not render the evidence unreliable. The court held that only material contradictions vitiate conviction.
- 56 In this case inconsistencies appear normal human recollection distortions, expected especially with a minor witness and a domestic-relationship context. The finding of this court is therefore that no material contradictions that would invalidate the conviction has been established and this ground cannot be sustained.



- 57 On whether or not the sentence meted out by the Trial Court was harsh in the circumstances of the case, the Appellant was sentenced to serve 20 years' imprisonment less one year spent in custody resulting to 19 years' imprisonment under Section 8(3) of the *Sexual Offences Act*. However, it is observed that the Trial Court while passing sentence said:
- 58 I have considered the mitigation by the accused person together with the circumstances of the case. I do appreciate that the accused is a first offender. Unfortunately, the only penalty available under Section 8(3) of the *Sexual Offences Act* is a minimum of 20 years imprisonment. The court has no alternative but to sentence the accused person as per the law. The accused will serve 20 years imprisonment less 9 months spent in remand custody.”
- 59 The Trial Court therefore duly considered the Appellant's mitigation save that the minimum mandatory sentence could not allow exercise of discretion. Upon perusal of the PRC form it is indicated that the Appellant was 30 years at the time he committed the offence. Being a neighbor to the Complainant he must have known that she was a child and still in school.
- 60 The offence for which the Appellant was convicted remains serious and although he is a first offender the sexual encounter was described as consensual by the minor and no violence or aggravating factors were established the Appellant stood in the position of a big brother or guardian to the Complainant and his sexual engagement with her outweighs the mitigating factors raised by him.
- 61 In conclusion the appeal on conviction and sentence cannot stand as they lack merit and the same is dismissed save that the Appellant will serve the last 3 years of his sentence on probation supervision.
- 62 Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 19TH DAY OF FEBRUARY, 2026.

