Ndungu v Republic (Criminal Appeal E001 of 2022)
[2026] KEHC 2184 (KLR) (23 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2184 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E001 OF 2022

SM MOHOCHI, J

FEBRUARY 23, 2026

BETWEEN

BERNARD NDUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decision of Honourable Rita Amwayi (RM) in Molo SO No. 82 of 2017 delivered on 12th July, 2019)

JUDGMENT

1. The Appellant was arrested on 19th September, 2017 and charged on 21st September, 2017 with three (3) Counts of Defilement contrary to the *Sexual Offences Act*.

   Count I: Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that: -

   > On 16th of day of September, 2017 in Kuresoi North Sub-County of the Nakuru County, intentionally caused his penis to penetrate the vagina of IW a child aged 8 years.

   Alternative Charge: Committing an Indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 0f 2006. The particulars were that: -

   > On 16th of day of September, 2017 in Kuresoi North Sub-County within Nakuru County, intentionally touched the vagina of IW with his penis against her will.

Count II: Defilement contrary to section 8(1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that;

> On 16th of day of September, 201 in Kuresoi North Sub-County within Nakuru County, intentionally caused his penis to penetrate the vagina of KN a child aged 9 years

Alternative Charge: Committing an Indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that: -

> On 16th of day of September, 2017 in Kuresoi North Sub-County within Nakuru County intentionally touched the vagina KN a child aged 9 years with his penis

Count III: Defilement contrary to section 8(1) as read with Section (2) of the *Sexual Offences Act*. The particulars of the offence were that;

> On 16th of day of September, 2017 in Kuresoi Sub-County within Nakuru County intentionally caused his penis to penetrate the vagina of LN a child aged 8 years with his penis

Alternative Charge: Committing an Indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that: -

> On 16th of day of September, 2017 in Kuresoi Sub-County within Nakuru County intentionally touched the vagina LN a child aged 8 years with his penis, intentionally touched the vagina of LN a child aged 5 years with his penis.

Prosecution's case

2. PW1 KN testified that on 16th September 2017 she was playing on the road with LN and IW. The Appellant promised to give them Kshs. 10 to buy sweets. They went to the nearby shop and left the Appellant at his house. He later called them to his house gave them food. He locked the door and took them one by one to his bedroom

3. She stated that he started with her. He took her to his bed, removed all her clothing, made her lie on his bed unzipped his trousers then did bad manners to her by inserting his thing for urinating into hers of urinating. That she was in pain and was crying. The other children were not seeing. When he was done, he threatened to kill her if she told anyone.

4. He then called LN to his bedroom. PW1 heard LN crying. When LN came, she did not ask her anything. He called IW to the bedroom. She did not hear what happened but heard IW crying. Afterwards, he let them go with a warning not to tell anyone.

5. On Sunday she went to church in pain and on coming back she stayed in bed due to pain. She said she started urinating blood. Her mother asked her what happened and later took he to the police. She was taken to hospital the next day

6. She stated that she knew the Appellant as he did causal jobs at their home, was a neighbour and well known to her. In cross examination, she reiterated that the Appellant threaten to kill them thus she ferae to tell anyone.

7. PW2, LN testified that on 16th September, 2017, she was playing on the road IW and KN when the Appellant greeted them. He gave them 10 shillings and they went to the shop and bought sweets. The

Appellant then took them to his house, gave them food served in one plate. After eating he told them to go to his bed in another room one by one.

8. He stated with PW1. They heard PW1 crying and when she returned dressed, they asked what was wrong and she told them the Appellant has done bad manners to her. He then came for her, took her to his bedroom he undressed her fully, unzipped then made her lie on the bed. He then proceeded to put his thing of urinating into her. When he was done, he told her to dress and threatened to kill her if she told anyone. He then called IW. When he was done with IW he unlocked the door and warned them against telling anyone.

9. When she got home, she told her mother and the next day her mother noticed she was urinating blood. She was taken to hospital. They reported the matter to the hospital together with her mother and the mothers of the other children. She stated that the Appellant was well known to him as he was a neighbour and identified him in Court.

10. PW3 JW, mother to PW2. She testified that PW2 came from PW1's place saying the Appellant had told her to go for 10 shillings. He advised her against taking the money then she left. He instructed her brother to follow her, who then found her at the Appellant's door.

11. On 17th September, 2027 PW2 told her that she had urinated blood had injuries on her private parts. On Monday she informed him that she had a headache and could not go to school. On Tuesday she again said she would not go to school. At lunch time she overheard her talking with IW that they had been defiled. On enquiry they narrated how the Appellant, who is her cousin gave them money to buy sweets, took them to his house and defiled them.

12. They then IW grandmother's where the children narrated again what had happened then they went to PW1's place. PW1 denied but later when asked by her father she admitted that the Appellant had defiled them and that he had threatened to kill them hence the reason they had not told them.

13. PW4 GM mother to PW1. Testified on 19th September, 2017 PW3 alongside PW2, CN and IW and asked if PW1 disclosed anything. She PW1 had not disclosed anything. It was until her father came that she said that the Appellant had given them 10 shillings to but sweets, called them to his house, gave them food then proceeded to defile them one after the other. Thereafter he threatening them with death if they told anyone. They reported to the police, accused was arrested and the children together with the accused were taken to hospital.

14. She identified the Appellant stating that she knew him well as she would give him casual work. In cross examination she stated that she noticed that her child was unwell and sleeping on the sofa so she thought she had a cold. That she had taught her children to clean their underwear when they shower.

15. PW5, CN, grandmother to IW, she testified that on 16th September, 2029 IW came late chewing sweet. She asked where she had gotten the money from, she said she had been given money by the Appellant together with PW1 and PW2. On 19th September, 2017 ladies went to her home and told them that the children had been defiled by the Appellant.

16. She asked PW1 had happened she narrated how the Appellant had given them money to buy sweets, took them to his house and defiled them. On asking IW, she told her that she took her to his bedroom but nothing was done. She stated that she had no feud with the Appellant but knew him as her neighbour

17. PW 6, IW, she identified the Appellant as "Majay". She testified that while she was playing with PW1 and PW2, PW1 asked money from the Appellant who gave them 10 shillings. They bought sweets and PW1 said they go back to the Appellant's house where they ate. He called PW1 to the bedroom then

called PW2. Then he called her to the bedroom. He did not do anything and told her to go back. When they left the house, he threatened to kill them if they told anyone.

18. PW7, Dr. Mbenya Mbithi produced P3 forms (P Exhibit 2) for PW6 she was in fair general health, had no injuries observed on genitalia and no discharge noted. P3 form for PW1 she was in fair general health and examination on genitalia revealed there were no injuries on external genitalia and with no discharge. P3 form for PW2 examination of genitalia revealed presence of bruises and genitalia and labia were inflamed. There was also vaginal bleeding noted.

19. In cross examination, he stated that the patient had been defiled on 17th September, 2017 and was examined 19th September, 2017. He observed inflammation but did not require medication.

20. PW8, CPL Boniface Njururi. Testified that on 19th September, 2017 police officers from AP RDU went to the Police post with the Appellant on allegations that he had defiled minors on 16th September, 2017. The children were brought and reported that the Appellant called the three children one by one, gave them food as well as 10 shillings to buy sweets. After buying sweets he called them one by one to his house undressed them then he proceeded to defile PW1 and PW2. The youngest PW6 reported that the Appellant told her to undress looked at her but did not defile her.

21. PW3 reported that she noticed PW2 had difficulty walking and upon interrogation the child disclosed what happened. He produced baptism card for PW2 (P Exhibit 1) the clinic card for PW1 (P Exhibit 1) and copy of birth certificate for PW6 (P Exhibit 1)

22. In cross examination, he stated that the arresting officers did not look for anything because the children had identified him as the assailant and when they were taken to hospital it was confirmed they were defiled. He added that he interrogated the Appellant at the station, he told the PW8 what had happened and sought forgiveness. He added he never received any report of dispute between the Appellant and any other person of the parents of the complainants.

23. Following closing of the prosecution's case the Appellant was found to have a case to answered and placed him on his Defence

Defence case

24. DW1, the Appellant, testified that on 16th September, 2017 he woke up and proceeded to his work which he had began on 11th September, 2017 at a neighbour. That he worked overtime up to 5.00pm. He left with his boss to cater for payment. He got home at 7pm. He stayed home the following day on Sunday. On Monday he left for work. Tuesday again he left for work and worked up to 5pm. He went home prepared food and slept at 9.pm. At around 11.30 pm he heard a knock on the door, there were police who arrested him without telling him the reason.

25. He was taken to Molo the next day and was examined. He had his finger prints taken and was brought to Court and charged

26. In cross examination he stated he worked in his neighbour's farm harvesting potatoes. That there were many people and he worked up to 5.30. He was with Gichuhi the whole day but did not call him as a witness. He stated that he knew all the children as they were his neighbours and that the children knew him well. That he had feuds with all his neighbours.

27. In the judgement delivered on 12th July, 2017, the Appellant was found guilty of the of the Alternative Charge of Indecent Act in Cout II and the Offence of defilement in Count III and convicted accordingly.

28. He was sentenced to life imprisonment in respect of Count III. In respect of the Alternative Charges in Count II, the sentence was held in abeyance.

Appeal

29. Dissatisfied with the decision, the Appellant preferred the instant appeal on the following Amended grounds filed on 28th May, 2025.

    i. That the Learned Trial Magistrate erred in both law and fact by convicting the Appellant yet failed to find Penetration had been proved.

    ii. That the Learned Trial Magistrate erred in both law and fact by convicting the Appellant yet failed to find that the medical evidence adduced did not corroborate the charge

    iii. That the Learned Trial Magistrate erred in both law and fact by convicting the Appellant after dismissing his defence of alibi without adequate consideration

    iv. That the sentence imposed is both hash and excessive and did not take into consideration the Appellant's mitigation and the unique circumstances of the case.

30. He prayed the Appeal be allowed, conviction quashed, sentence set aside and be set at liberty.

31. The Appeal was canvassed by way of written submissions.

Appellant's Submissions.

32. It is submitted the evidence narrated by the complainant falls short of satisfying the legal threshold required to prove penetration. Reference was made to the finding in Kariuki vs Republic [2014] eKLR where the Court held that penetration was a matter of fact to be established by evidence.

33. He argues that there is no medical examination to confirm penetration or injury consistent with penetration. He contends that the statement "I felt pain" is subjective and common in sexual offences cases. To sustain this argument, he relied on the case of Josephat Mugo republic [2012] eKLR where it was found that penetration must be proved with certainty and cannot be inferred solely from the victim's testimony.

34. The Appellant submitted that the evidence of PW7 did not corroborate occurrence of the offence. He argued that the presence of bruises and inflation typically indicates trauma or injury which often requires medical intervention. That by PW7 declaring that "she did not need treatment" is contradictory and suggest lack of proper clinical assessment or understanding of the injury's significance. That the lack of provision of treatment to the minor may reveal that the offence never took place.

35. The Appellant contends that his defence of alibi was not considered. He argues that his failure to call a specific witness does not negate the validity of an alibi. He further submits that it was not the Appellant to prove his alibi beyond reasonable doubt but rather upon the prosecution to prove his guilt beyond reasonable doubt. It was his argument further that the Magistrate's conclusion that he had an opportunity to avail his alibi did not infer guilt and actual evidence that he was at the scene had to be availed.

36. On the sentence, the Appellant challenged the Constitutionality of Section 8 (2) of the Sexual Offence Act and submitted that mandatory nature of life sentence is disproportionate to the crime potentially violating the accused rights. he relied on the case of Elizabeth Wanjiru Macharia v Republic [2014]

eKLR to submit that the mandatory provisions deprive of the discretion of proportionality thereby violating the constitutional right under Article 50.

37. The Respondent's submissions are not on record.

Analysis and determination

38. Having considered the grounds of appeal, the record of proceedings, and the submissions of the Appellant, the Court frames its analysis around the following issues;

    a. Whether the offence of defilement was proved beyond reasonable doubt

    b. Whether the burden of proof shifted

    c. Was the sentence imposed harsh, excessive, or unconstitutional?

39. In order to establish the offence of defilement, the prosecution must prove three essential ingredients. First, that the complainant was a child under the age of eighteen years; second, that there was penetration, however slight, and third, that the accused was positively identified as the perpetrator of the act. See Opondo Olunga vs Republic [2016] eKLR

Age

40. On the limb of age, the Court in Cosmas Koech v Republic [2021] eKLR placed reliance in the case of Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, is explicit on proof of age of the sexual victim that:

> " 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 any 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..."

41. The offence took place on 16th September 2017. PW8 produced identification documents to establish the ages of the victims. The baptism card for PW2 indicated she was born on 16th June 2009, making her 8 years old at the time of the offence. The clinic card for PW1 showed she was born on 3rd January 2008, making her 9 years old at the time. The birth certificate for PW6 confirmed she was born on 7th January 2010, making her 7 years old at the time. These documents conclusively establish that all the complainants were minor children.

Penetration

42. On penetration Section 2 of the *Sexual Offences Act* of 2006 which defines penetration as:

> " The partial or complete insertion of the genital organ of a person in the genital organ of another person.

43. The Court of Appeal in the case of Stephen Nguli Mulili v Republic [2014] eKLR the Court of Appeal had this to say;

> " As a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such

evidence is corroborated. The proviso to that section make an exception in sexual offences and provides as follows:

> " Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

44. PW2 gave direct testimony of penetration. PW2's medical examination conducted and produced by PW7 confirmed bruises, inflamed labia, and vaginal bleeding. PW7's findings corroborated PW2's testimony.

45. The Appellant also questioned PW7's statement in the assessment of PW2's injuries where he testified that "she did not need treatment". According to the Appellant the presence of bruises and inflation was indicative of trauma or injury which often requires medical intervention.

46. Whether treatment was prescribed or not is immaterial to the legal question of whether penetration occurred. Medical specialists often distinguish between injuries requiring urgent intervention and those that are self-limiting. The absence of treatment does not erase the medical findings, it merely reflects clinical judgment that the injuries did not require further medical intervention.

47. The Court finds that the Prosecution proved penetration in respect of PW2 beyond reasonable doubt.

48. PW6 confirmed being taken to the bedroom but not assaulted. The medical records also do not indicate any injuries consistent with defilement. The Court therefore finds that the prosecution did not prove defilement or the offence of indecent act in respect of PW6.

49. As for PW1, an account of penetration that was not confirmed by the testimony of PW7 during trial. The medical records revealed an inflamed labia minora. There was a gap between oral testimony and medical confirmation. She did not undergo medical examination until 9th September, 2017 whereas the assault took place on 16th September, 2017.

50. The Court is mindful that under Section 2 of the *Sexual Offences Act*, penetration, however slight, constitutes defilement. Yet, where medical evidence is inconclusive, Courts must weigh whether the testimony establishes penetration beyond reasonable doubt. The Court emphasizes that the absence of observable injuries at the time of examination does not undermine PW1's testimony. Her narrative was consistent and credible, but the absence of corroborating medical findings leaves room for doubt as to penetration.

51. The delay in examination may also explain the absence of observable injuries at the time of medical review. Nonetheless, what is clear, however, is that the Appellant engaged in conduct of a sexual nature with PW1, including undressing her, laying her on the bed, and attempting penetration. Such conduct falls squarely within the ambit of Section 11 of the *Sexual Offences Act*, which criminalizes indecent acts with a child. An indecent act is defined as any unlawful intentional act which causes contact between any part of the body of a person with the genital organs, breasts, or buttocks of another, but which does not amount to penetration.

52. In this regard, the Court therefore finds that the prosecution proved an indecent act but not defilement.

Identification

53. On the final limb identification, all the child witnesses, PW1, PW2 and PW6 were categorical that they knew the Appellant personally, as a neighbor and casual worker. They also confirmed going to his place and being given food following prior enticement with sweets. PW3, PW4 and PW5 confirmed familiarity. PW8 recounted that the Appellant was identified by the children and even admitted the acts, seeking forgiveness. The Appellant admitted knowing the children well and being known to them.

54. The Court of Appeal in Francis Muchiri Joseph v Republic (2014) eKLR held that:

> " In Lesarau v R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name".

55. Identification here grounded in recognition based on familiarity and proximity. Further all the witnesses identified him by name. They were not dealing with a stranger encountered in passing but with someone familiar in their daily lives. The Court is satisfied that the Appellant was positively and reliably identified.

Burden of proof

56. As to whether the burden of proof shifted, the Appellant contends that the burden of proof shifted when the trial Court disregarded his alibi evidence. He argues that his failure to call a specific witness does not negate the validity of an alibi. That the duty then fell on the prosecution to displace the alibi evidence by adducing evidence placing him at the scene.

57. The burden of proof in criminal cases rests with the prosecution and never shifts to the accused This principle was firmly established in Woolmington v DPP [1935] AC 462.

58. There was consistent and corroborated testimony from PW1, PW2, and PW6, all of whom knew the Appellant personally and identified him and describing in detail their ordeals. PW8 further testified that the Appellant admitted the acts and sought forgiveness.

59. The trial Court was therefore entitled to reject his defence not because the Appellant failed to prove it, but because the prosecution's evidence overwhelmingly displaced it. The burden of proof did not shift, it remained with the prosecution, which was discharged beyond reasonable doubt.

Sentence

60. The Appellant has also faulted the Trial Court for imposing a life imprisonment sentence without consideration the Appellant's mitigation and the unique circumstances of the case. He submitted that the same was harsh and that the mandatory nature of life sentence is disproportionate to the crime.

61. The Appellant's mitigation was that he suffers from high blood pressure. The Appellant's claim of high blood pressure, while noted, does not diminish the gravity of the offence nor does it provide a legal basis for departure from the sentence. The Appellant's mitigation was considered but could not alter the statutory requirement.

62. On the mandatory nature of the sentence, Section 8(2) of the *Sexual Offences Act* provides that: -

> " 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."

63. In Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) The Supreme Court reaffirmed that mandatory minimum sentences under the *Sexual Offences Act* remain binding. Further the principle in Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KESC 31 (KLR) does not extend to sexual offences.

64. In respect of Count III, the trial Court imposed life imprisonment pursuant to Section 8(2) of the *Sexual Offences Act*, given that PW2 was aged 8 years at the time of the offence. The sentence was therefore lawful.

65. In respect of Count II, the trial Court held the sentence in abeyance. This was a pragmatic approach, recognizing that the life sentence already imposed adequately addressed the gravity of the offences.

66. In the premise, I find the appeal both on conviction and sentence devoid of any merit and I hereby dismiss it.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 23RD DAY OF FEBRUARY, 2026

MOHOCHI S.M

JUDGE