Mwiti v Republic (Criminal Appeal E091 of 2023)
[2026] KEHC 3268 (KLR) (12 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3268 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E091 OF 2023

AK NDUNG'U, J

MARCH 12, 2026

BETWEEN

DENNIS MUTWIRI MWITI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki
CM Sexual Offences Case 39 of 2017– Kithinji A.R-CM)

JUDGMENT

1. The Appellant, Dennis Mutwiri Mwiti was convicted after trial of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on diverse dates between 29/07/2017 and 11/08/2017 at Ngusishi trading centre, Meru County intentionally and unlawfully caused his genital organs namely penis to penetrate the genital organs namely vagina of S.K a girl aged 7 years. He was tried and convicted and on 24/10/2023, he was sentenced to twenty-one (21) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he lodged this appeal vide a petition of appeal filed on 07/04/2023. His counsel however filed amended petition of appeal dated 20/05/2024 with leave of this court and supplementary grounds of appeal filed alongside submissions. The conviction and the sentence are being challenged on the following grounds;

    Amended petition of appeal

    i. The learned magistrate erred by convicting him on the sole uncorroborated evidence of a minor and without satisfying himself that the victim was telling the truth.

ii. The learned magistrate erred by failing to make a finding and accordingly record whether the victim was telling the truth or not and his reasons for such belief.

iii. The learned magistrate erred by failing to appreciate and hold that the charge against him was not proved beyond reasonable doubt without his defence as he was misadvised by the then Counsel on record not to defend himself.

iv. The learned magistrate erred by failing to warn him of the danger of not defending himself after he was misled by the then Counsel on record.

v. The learned magistrate erred by sentencing him to serve a sentence which was manifestly excessive for an offence that had not been proved against him.

Supplementary grounds of appeal

i. The learned magistrate erred by failing to note that penetration was not proved since the evidence of a missing hymen is not prove of defilement.

ii. The learned magistrate erred by failing to note that he was not given an opportunity to defend himself.

iii. The learned magistrate erred by failing to note that the prosecution failed to prove their case beyond reasonable doubt.

3. The appeal was canvassed by way of written submissions. For the Appellant, it is submitted that evidence on penetration was not conclusive as the report indicated that there were no injuries noted on child's genitalia raising the question how the medical officer formed an opinion that the child had been defiled. The report further said that the child had a missing hymen and an infection due to increased white blood cells or pus cells. The infection was not connected to a sexually transmitted disease and neither was it connected to him. PW4 also stated that the absence of blood in a case of this nature is a negative finding. That foul smell is not sign of defilement but may even from a sexually transmitted disease.

4. That DW1 concluded that after examining the two P3 forms, the child had infection but no evidence of defilement. That this showed that the medical officer who examined PW2 may have been mistaken in her diagnosis. The fact that the minor complainant had told her that she had been defiled may have closed her mind to other possibilities. That the two medical reports conflicted each other raising the question as to who was more qualified. That Dr. Maina did not testify so her academic qualification is not known.

5. It is submitted that it was an erroneous assumption to conclude that a girl had been defiled just because a missing hymen had been observed without any accompanying secondary signs such as epithelial cells, blood, inflammation or lacerations. Further, that PW2's testimony was inconsistent as she testified that she had been severally assaulted but later she said she was defiled only once. Her testimony was not heard by the trial magistrate who convicted and sentenced him and that her evidence was not corroborated. The succeeding trial magistrate did not get the opportunity to see or hear PW2 testifying. PW2's and PW1's evidence needed to be assessed and gauged for credibility and reliability by actually seeing and hearing them testifying.

6. It is submitted that the Appellant was not given a chance to defend himself as the proceedings are clear that he was put on his defense but never allowed to defend himself in person. There was no evidence

that he elected to remain silent as insinuated in the judgement and therefore he was not afforded a fair trial as envisioned under Article 50 of *the Constitution*.

7. Regarding sentence, the court is urged to reduce the sentence since this court has unlimited powers of revision of sentence as provided by Article 165(3) of *the Constitution*.

8. In rejoinder, the Respondent's counsel submitted that age was proved by birth certificate, oral evidence and medical evidence. Penetration was proved through the P3 and PRC forms and PW5's conclusion in the medical observation was that the hymen was missing. This was corroborated by PW2 who testified what the Appellant did and PW1 who noticed blood in complainant's clothes.

9. Further, that identification was through recognition as the Appellant was a neighbour. That the trial court duly complied with section 211 of the Criminal Procedure Code and it is the Appellant and his counsel who chose to close the defence case after calling one witness. That the sentence was proper as the trial court followed the laid down procedure while sentencing him.

10. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court.

11. This duty was set out in Okeno vs. Republic [1972] EA by the Court of Appeal as follows;

> " 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."

12. This duty was also explained in Kiilu & Another vs. Republic [2005]1 KLR 174, where the Court of Appeal stated thus:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.
>
> 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; 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.

13. The evidence at the trial court reads as follows. PW1, the complainant's mother testified that on 29/7/2017, she returned home from work at 5.00pm. She had left the complainant behind with other kids within the plot. She noticed that the white dress the complainant was wearing had blood stains. She asked her where the blood was from but she gave no positive response. After some days while cleaning her, she complained of pain in her private parts. On another day, after 2 weeks, she returned home

and found that she hadn't done her homework. She told her that she had spent time at Mutwiri's, the Appellant. He had a kiosk nearby. After a while, she noticed that she had menses and she reported that Appellant had given her the same. She informed her that the Appellant called her to his place, caused her clothing out (sic) and did bad manners before he wiped her with a piece of cloth. She reported that accused warned her against telling her.

14. When she inquired from the Appellant, he apologized after admitting the allegation saying that he was drunk then. She took the child to a private clinic and the Appellant was with them. He requested to accept some settlement. They were sent to government hospital and she alerted the child's father who joined them. She reported the matter at Timau police station and escorted complainant to Nanyuki Hospital where she was examined. The Appellant was their neighbour of 2 years and she had not differed with him prior to material dates. He related well with her husband. The complainant failed to report the ordeal to her after being warned by Appellant against disclosure.

15. On cross examination, she testified that he never asked her to cease shopping at his kiosk. It was not true that he spent money on the complainant. She never assaulted him and it was not true that they were lovers. On further cross examination by Appellant's counsel, she testified that she noticed the blood soiled dress when she was doing washing. She did not include the washing bit in her evidence. Her statement stated that when she asked her about the stain, she answered that it was chocolate. 2 days after 28/7/17, the complainant complained of pains in her private parts. She did not bath her on 29/7/17. On 30/7/17 she bathed her and she complained of pains. On 11/8/2017 complainant told her that she had spent time with the Appellant.

16. On re-examination, she testified that she took long to act because the complainant was mum about the ordeal.

17. PW2, the complainant testified that she was 7 years old and in class one. She knew the Appellant and he had a shop. That she had been to his house twice when her mother was away and he did not have children. His house was adjacent to his shop. She saw a big seat and money in the house. He took her to his house. They were the two of them. He removed her dress. He pulled it up high and then pushed his small thing in hers- touching her private parts. He pushed in the thing between his legs in her. (Hard for child to narrate). After that, he pulled her dress back. She felt pain during the ordeal. He did that to her many times and she reported it to her mother. She was taken to the hospital by her mother and father. The Appellant was there as well. He had warned her not to disclose the ordeal to her mother. He gave her sweet gum and 10/=. She disclosed the ordeal to her mum after she beat her up. She did not disclose because the Appellant had asked her not to reveal it to her mum.

18. On cross examination, she testified that she had seen her mother at his place once. Her mum used to shop at his place. They went to hospital with him and he gave out money towards her treatment. She saw her mother beat him. On further cross examination by Appellant's counsel, she testified that she was not told by her mother what to come and say in court. The Appellant did bad manners to her once and she informed her mother.

19. On re- examination, she maintained that the Appellant did bad manners to her once.

20. PW3, the complainant's father testified that on 11/8/2017, he received a call from his wife who informed him that the Appellant, their neighbour had defiled the complainant. He proceeded to where they were at a private clinic and they reported the matter and the Appellant was arrested. He had not differed with him prior the incidence. He owned a shop and he had no family. He related well with his wife. The hospital report confirmed that the complainant had been defiled.

21. On cross examination, he testified that he did not know how he related with PW1. That they requested for a settlement but he never took his money from the police office.

22. PW4 testified in place of, and exhibited a medical report dated 14/8/2017, filled by Dr Maina who was away on further studies. She had worked with her for 4 years and she understood her handwriting and signature. The complainant gave history of defilement and on physical examination, she had no physical injuries. On examining the child's genetalia, no injuries were noted. She had foul smell from her vagina. There was no bleeding and discharge though. Her hymen was missing, H.VS was done and no spermatozoa was noted but pus cells. There was increased white blood cells. The doctor's opinion was that the child had been defiled. The doctor relied on the PRC form and treatment notes. She produced the treatment notes, P3 and PRC forms as Pexhibit 2, 3 and 4 respectively.

23. On cross examination, she testified that it was not true that injuries must be inflicted during defilement. That no spermatozoa were traced. No DNA was done between the complainant and the Appellant. The child's private parts produced foul smell which was a sign of infection. Even after defilement, the complainant could have walked well. Virginity could be disturbed by other forces not necessarily through sexual penetration. On further cross examination, she testified that according to the P3 form, there were no tears observed. External genitalia was normal but that did not mean there was no defilement. Missing hymen indicated penetration. Vigorous exercises could break the hymen. It was not a must that bruises had to occur to the complainant aged 7 years especially if there was no struggle. No blood was noted and this was indicated so because it was one of the things doctors look for in a case of this nature. The absence of blood did not mean absence of penetration. The absence of blood in a case of this nature is a negative finding. Foul smell is not a sign of defilement but may even be from sexually transmitted disease. No spermatozoa were seen in the complainant's vagina. That her conclusion would equal her colleague's opinion. The history given is crucial, the outcome of physical examination and the findings. Pus cells found from high vagina swab was an indicator of penetration. Spermatozoa is not absolute indicator of penetration. It was highly likely that complainant was defiled.

24. PW5, testified that she took over the matter after the investigating officer was taken ill. The complainant was escorted to station by her parents. She also saw the Appellant being escorted to the station. She produced complainant's birth certificate as Pexhibit1.

25. On cross examination, she testified that members of public escorted him to the station. She did not know of his relationship with PW1.

26. DW1 Dr. Samantha Maalim, a doctor testified that she received a request from Mwangi Kariuki Advocate on behalf of the Appellant to examine P3 forms for the complainant and Appellant. The P3 forms were completed by a Dr. Maina. Under section C in Pexhibit3, the P3 form, the genetalia was normal but with a broken hymen and Dr. Maina said there was evidence of defilement. That she would have concluded she had infection but no evidence of defilement. That she had a P3 form for the Appellant. Examination was normal but there were penile wats. That he said his findings were inconclusive. Her opinion after examining the two P3 forms was that there was no defilement. She prepared a report dated 14/8/021 which she produced Dexhibit 1 (a), P3 form Dxhibit1 (b) and a Letter Dexhibit 1 (c).

27. On cross examination, she testified that she did not carry any documents to prove that she was a doctor. She did not examine the patient.

28. On cross examination by the court, she testified that defilement is one of the ways to break the hymen for a 7 year old girl.

29. That was the totality of the evidence before the trial court. I have had occasion to consider the evidence at trial. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard of the submissions made and case law cited. I have taken into account the applicable law. The broad issue for determination is whether the prosecution proved its case to the required degree. To answer this question, the court will have to scrutinize the evidence to find whether each ingredient of the offence was proved.

30. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator.

31. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

32. 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."

33. In the present appeal, age is not disputed. It was proved through the complainant's birth certificate that was produced by PW5 as Pexhibit1. It indicated that she was born on 01/08/2010. The offence was alleged to have been committed on July and August 2017 hence she was 7 years at the time and hence a minor for the purposes of *Sexual Offences Act*.

34. With respect to penetration, the Appellant attacked the complainant's evidence as well as the medical opinion by PW4. He also called a doctor, DW1 as his witness who stated that in her opinion, there was no defilement. He also stated that the complainant's evidence was inconsistent as she testified that he defiled her severally whereas on further cross examination, she testified that he defiled her once. He further stated that the magistrate who convicted him did not see the witnesses testify so he could not have gauged the witness's credibility. While convicting the Appellant, the trial court relied on the complainant's evidence which he found corroborated by PW1's and PW4's evidence.

35. The complainant testified how the Appellant took her to his house on two occasions and defiled her. She testified that they were the two of them and he removed her dress. He pulled it up high and then pushed his small thing in hers- she pointed at her private parts, as the place where he inserted his thing. He pushed in the thing between his legs in her. After that, he pulled her dress back. She felt pain during the ordeal. He did that to her many times and she reported it to her mother. She even described his house in that it had a big seat and she also saw money in his house. After the ordeal, he gave her sweet gum and 10/-. He warned her not to disclose to her mother. The complainant thus described in graphic details what exactly was done to her.

36. PW1, her mother testified how she noticed blood in complainant's white dress and when she inquired from her, she did not get a positive response. After sometimes, the complainant complained of pain in her private parts when she was bathing her. After a while, the complainant had not done homework and she said it was because of the Appellant. She also noted blood which she thought was menses from complainant's private parts and when she inquired form her, she said it was the Appellant who gave it to her and she then disclosed what he had done. She confronted him and he admitted but he said he was drunk at the time. There was also a discussion for settlement which was confirmed by PW3, the complainant's father.

37. PW4, the clinician stated that after examination, there was proof of penetration as the hymen was missing, pus cells seen and there was increased white blood cells. She testified on further cross examination by the Appellant's counsel that she could have made the same conclusion. She testified that the external genetalia was normal but on high vaginal swab, there were pus cells which was an indicator of penetration. The results were highlighted in the treatment note, the P3 and PRC forms.

38. From the evidence of the complainant, it is my view that penetration did occur since her evidence was corroborated by that of PW1, her mother who observed blood from her vagina and PW4 who in her opinion, found that there was proof of penetration from medical examination and also from the treatment notes, the P3 and PRC forms. Further, PW1 and PW2 confirmed that the Appellant accompanied them to the hospital and PW2 testified that he even paid for her treatment. PW2 and PW3 also confirmed that there was some kind of settlement. All this points to the fact that he had committed the offence.

39. The Appellant called DW1 who testified that according to her opinion, there was no proof of penetration but there was proof of an infection. She testified that she was a medical doctor and on cross examination, she did not have documentation to show that she was a qualified medical doctor. Further, she confirmed that she did not examine the complainant. On cross examination by the court, she confirmed that defilement was one of the ways to break the hymen for a child aged 7 years old.

40. On the contention that the convicting magistrate did not have an opportunity to gauge the credibility of the witnesses as they testified since he took over the matter from another magistrate, I refer to the case of Daniel Kimaru Kuria V Republic [2013] KEHC 5000 (KLR) where the court held that;

> " The learned trial magistrate relied, not on demeanour, but on the critical analysis of the evidence on record. To my mind, the process undertaken by the succeeding magistrate cannot, in principle, be faulted. It cannot be right to argue, as the appellant did, that because a judicial officer did not observe one or another witness testifying, he cannot determine whether or not the evidence of that witness was admissible and valuable. If that were the position, then there should never be any convictions in cases which are determined by judicial officers who took over the conduct of trials from their predecessors. The very efficacy of section 200 of the Criminal Procedure Code would be put to question. In many cases, the trial court's determination will not depend on the demeanour of witnesses, but on the content of the evidence. Therefore, just because the succeeding magistrate did not observe the demeanour of the complainant is not reason enough to fault his decision, which is partially informed by the evidence of the said complainant."

41. As to identity, the complainant named the Appellant as the perpetrator, she did not mention someone else. He was well known to her, PW1 and PW3 as he was their neighbour. PW1 and PW3 testified that they related well and had not differed. He had a shop in the same plot they were staying. It therefore follows that identity was through recognition.

42. The Appellant submitted that his right was infringed as he was not given an opportunity to defend himself and the court failed to inform him as to his rights to tender a defence. It is argued that the counsel who represented him during trial misguided him not to defend himself.

43. The record shows that he only called one witness, DW1 but he did not tender any evidence himself. The record further shows that after the close of the prosecution's case on 06/07/2018, section 211 was also explained to him and he prayed for a hearing date which was slated on 27/07/2018. On 05/08/2021 after PW1, PW2 and PW4 had testified on further cross examination by his advocate, section 211 was again complied with and explained to the Appellant who chose to give sworn evidence and a defence

hearing date was given. On 10/08/2023 after defence adjourning severally after Dr. Maina proved elusive, the defence counsel closed the defence case.

44. It therefore follows that he was given a chance to defend himself on two occasions but chose to close the defence without defending himself. This was an option available in law and which he took of his own free will. The only evidence called by the defence is that of Dr. Samantha Maalim who stated that she was asked by Mwangi Kariuki Advocate to examine two P3 forms for Martin and Stacy Kanana. The P3 forms had been completed by Dr. Maina. She said she did not know Dr. Maina. Her opinion after examining the P3 forms was that there was no defilement. She tendered a report confirming her findings.

45. With profound respect, the said report is in terms of evidential value worthless. The doctor's findings are hypothetical since she never examined the victim at the material time. The report does not aid the Appellant's cause.

46. With respect to sentence, the Appellant was sentenced to 21 years imprisonment. The offence under Section 8(2) carries a minimum sentence of life imprisonment. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (see Ogolla S/o Owuor v R {1954} EACA 270).

47. The Appellant did not demonstrate any of the above factors. The sentence imposed was in fact an illegal sentence as the Supreme Court laid to rest the controversy on the legality of the mandatory minimum sentences provided in the *Sexual Offences Act* in its decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa [ISLA] & 3 others [Amicus Curiae] [Petition E018 of 2023] [2024] KESC 34 [KLR] [12 July 2024].

48. Thus, this court would be inclined to enhance the sentence to one of life imprisonment but since the state has not sought such enhancement, this court lets the matter to lie.

49. With the result that the appeal herein has no merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MARCH 2026

A.K. NDUNG'U

JUDGE