



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muya v Republic (Criminal Appeal E003 of 2022)  
[2026] KEHC 3182 (KLR) (5 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3182 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL E003 OF 2022  
PN GICHOHI, J  
MARCH 5, 2026**

**BETWEEN**

**JOSEPH WAWERU MUYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being Appeal from Judgment of Hon. E. Soita (RM) delivered on 22nd December, 2021  
in Chief Magistrate's Court at Molo Criminal Case (Sexual Offences) No. 112 of 2020)*

**JUDGMENT**

1. The Appellant Joseph Waweru Muya had been charged with the offense of 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 charge were that on 16<sup>th</sup> August, 2020 at [Name Withheld], in Molo Sub-county within Nakuru County, intentionally caused his penis to penetrate the vagina of P.J.K, a child aged 7 years.
2. He was also charged with the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were on the same date, time and place, he intentionally touched the vagina of the same child aged 7 years.
3. He pleaded not guilty to the charges and the case then proceeded to full trial in which the prosecution called Five (5) witnesses.

**Prosecution case before the Trial Court.**

4. PW1 – The Complainant (PCK), a 7-year-old minor, offered an unsworn testimony. She stated that on the date in question, she was herding cattle with her friends S and sought to leave to go home and take care of the baby. While on her way home he met the accused, who approached her and led her to a maize field. She identified the accused person. She recounted that the person made her lie down, removed her clothing (trousers, a dress, and a T-shirt), and placed his 'urinating thing' on hers, threatening to



- strangle her if she screamed. Following the assault, the person gave her Kshs. 10. When she arrived home, she was beaten by S's mother due to the incident. Her father later found her crying, and upon being told what happened, he went to look for the perpetrator. The person fled upon seeing him. Her father then took her to the hospital, and the accused was subsequently arrested.
5. PW2 - (JK) The victim's father, testified that on 16<sup>th</sup> August, 2020, while he returned home to take his lunch, he found his daughter crying. Upon inquiry on why her daughter was crying, she told him that someone had taken her to the maize field and "did bad manners".
  6. He testified that her daughter described the assailant as wearing boots and a blue jacket. The father went to the area, saw a person fitting the description, and when he told him to stop, the person ran away.
  7. He chased the person but didn't find him. The father took the victim to the hospital, reported the matter to the police, and was later informed the person was arrested. The victim pointed out the accused person when he was found tied up by a neighbour. He was given a P3 form and a PRC form at the hospital.
  8. PW3 - (Joseph Cheboi), a neighbour, testified that he was called by the victim's father who informed him a child had been defiled. He was directed to the scene and found footsteps of gumboots in the maize field. Upon being caught, the assailant was identified by the victim as the one that defiled her.
  9. He testified that he saw the accused person coming to the area on a motorcycle with a rider, however, when the accused saw them, he removed his cap and seemed shocked but did not run away. When Purity was asked if she knew the person, she pointed to the accused. He took the accused person to the police station. He also admitted he did not know the accused person previously.
  10. PW4 - Dr. George Biketi from Elburgon Hospital testified that he examined, the complainant, Purity Chebet on 16<sup>th</sup> August, 2020, following allegations of defilement. He noted that the victim's inner wear had blood and white discharge. On physical examination of the genitalia, he found the hymen was freshly torn but there was no discharge or spermatozoa. He concluded that defilement occurred and produced the P3 form, PRC form, and laboratory test results as exhibits.
  11. In cross-examination, he admitted the hymen could be broken by other injuries, like from a bicycle, but stated the victim only had injuries on the hymen. He confirmed he had no proof of who committed the act, but confirmed the incident occurred.
  12. PW5- DCIO Judy Muthengi (No. 241990), attached to Elburgon Police Station, served as the Investigating Officer in this case. She testified that on 16<sup>th</sup> August, 2020, the victim and her father reported the defilement case. He stated that the victim informed her that she was playing with other children, when the accused person came and played with them, and when the other children left, the accused held the victim and defiled her at the maize field, giving her Kshs. 10 afterwards.
  13. The victim's mother beat her for being late, and she informed her father. Her father called neighbours to look for the accused. While at the hospital, the victim's father was informed the accused was arrested and brought to the station. The Investigating officer noted that the father and neighbours were unable to identify the accused person, stating they saw a motor cycle coming to the shamba (farm) with fertilizer.
  14. However, they did arrest the accused person and started investigations. The doctor confirmed the victim was defiled, with the hymen broken and innerwear containing stains of blood, confirming penetration.



15. In cross examination, she states that the investigation officer was not informed of the unknown person's identity.

### **The Defence case**

16. In his unsworn statement, he urged the court to dismiss the prosecution case for lack of evidence. Further, he stated that he was prejudiced because the complainant was given no referral names, which would end the case. He closed his case and sought to file submissions.
17. By the Judgment delivered on 22<sup>nd</sup> December, 2021, the Appellant was convicted on the main charge and sentenced to life imprisonment.
18. Dissatisfied with the decision, the Appellant filed this appeal on 5<sup>th</sup> January, 2022, and amended it on 7<sup>th</sup> March, 2024, challenging both his conviction and sentence.

### **The Appeal**

19. The grounds of his Petition of Appeal were that:-
  1. The learned trial magistrate erred in law and in fact in failing to recognize that the appellant's guilt was not conclusively conducted to link him to the commission of the offence.
  2. The learned trial magistrate erred in law and in fact in failing to direct that the Appellant be discharged, due to lack of investigations conclusively conducted to link him to the offence.
  3. The learned magistrate erred in law and in fact in failing to recognize that the failure to call vital witnesses by the prosecution entitled the Court to draw an adverse inference against it.
  4. The learned trial magistrate erred in law and in fact in failing to consider that there were contradictions and inconsistencies in the prosecution's evidence.
  5. That the learned magistrate erred in law and in fact in not properly addressing itself to the Appellant's defence.
  6. The learned trial magistrate erred in law and in fact in failing to consider that the Appellant had no legal representation.
  7. The learned trial magistrate erred in law and in fact in convicting on mere allegations and assumptions and holding the testimonies of the prosecution witnesses as truthful and beyond all reasonable doubt without the benefit of conclusively conducted investigations.
  8. The learned trial magistrate heavily misdirected herself in law in shifting the burden of proof to the appellant and further ignoring the defence of the appellant without proper evaluation.
  9. The learned trial magistrate erred in law and in fact without observing that there were no proper investigations by the investigating officers thereby basing the conviction on mere allegations and fabrication.
  10. The learned trial magistrate grossly erred in law and in fact in convicting the appellant against the weight of the evidence.
  11. The learned trial magistrate erred in law and in fact in failing to find that the failure to produce clothes worn by the minor at the time of the alleged rape was fatal to the case.
  12. The learned trial magistrate erred in law and in fact in not finding that failure by the prosecution to call the doctor who originally examined the victim prejudiced the appellant.



13. The learned trial magistrate erred in law and in fact in not finding that the prosecution did not prove their case beyond reasonable doubt.
  14. The learned trial magistrate erred in law and in fact in not finding that the case against the appellant was motivated by financial gain and greed.
  15. The learned trial magistrate erred in law and in fact in not finding that the prosecution did not prove all the elements of the offence of defilement.
  16. The learned trial magistrate erred in law and in fact in failing to properly assess the reliability and credibility of any circumstantial evidence presented by the prosecution.
20. The Appellant thus prayed for the Appeal to be allowed, conviction quashed and the sentence set aside.
21. Though direction were taken for the Appeal to be canvassed by written submissions, only the Appellant filed his on 29<sup>th</sup> October, 2024. The Respondent never placed any on the court record and neither was it uploaded on the Judiciary Tracking System (CTS).

#### **Appellant's Submissions dated 20<sup>th</sup> Octobe, 2024**

22. These were filed by the firm of Waichungo Martin & Co. Advocates who had come on record for the Appellant vide Notice of Appointment dated 15<sup>th</sup> October 2024.
23. The Appellant's core submission is that the prosecution failed to establish the positive identity of the assailant, asserting that the evidence presented on this crucial element was fundamentally weak and contradictory. He argued that the complainant, P.J.K. (PW1), referred to her assailant only as "the person" and provided no name or descriptive identification in her testimony.
24. That the description of the assailant wearing some boots and a blue jacket was first introduced by her father, JK (PW2), who claimed PW1 gave it to him before he pursued the alleged perpetrator. Critically, this description was never provided to the police during the initial report, and no witness testified that the Appellant was arrested wearing these specific items.
25. Furthermore, a third witness (PW3) introduced a new detail, claiming the accused removed a cap, a detail unmentioned by both PW1 and PW2.
26. It was submitted further that contradictions regarding the assailant's identity were also noted in official documents; such as P3 Form which indicated that PW1 alleged defilement by a person well known to her, while the PRC Form stated the assailant was unknown to her.
27. The Appellant heavily contested the circumstances leading his arrest, arguing that after the father chased away a person matching the description, he later found the accused already tied up by members of the public. Only at this point did he bring the complainant to the location, where she then pointed out the arrested and restrained individual. The Appellant argued, this was a compromised identification because PW1 knew she was expected to point out the person who had already been apprehended and tied up. Accordingly, he submitted that the prosecution's failure to conduct a formal identification parade created a high chance of mistaken identity.
28. The Appellant also highlighted the prosecution's failure to call key witnesses who were said to have seen the complainant being taken to the maize plantation or playing with the accused and PW1. This failure, it was submitted, attracts an adverse inference, a position he argued was settled in *Bukenya and Others V Uganda* (1972) EA 549.



29. To underscore the need for extreme caution with identification evidence, the Appellant relied on the case of *Charles O. Maitanyi v R* (1985) 2 KAR 75, as re-echoed in *Peter Mwangi Mungai V R* [2002] eKLR, emphasizing that the evidence of a single identifying witness must be tested with the greatest care. This testing, it was argued, requires the witness to have made a prior report and given a description before their ability is assessed, a requirement that was not met in this case.
30. The Appellant submitted that the guidelines set out in *R. v. Turnbull* [1976] 3 ALL ER 549 require the court to examine factors such as the length of observation, distance, light, any impediments, and any material discrepancy between the initial description and the accused's actual appearance.
31. Additional cited cases, including *Adam Daktari Konove V R* (2019) eKLR, *Cleophas Otieno Wamunga vs Republic* (1989) KLR 424, and *Valentino V R* (criminal Appeal E002 of 2023), were used to reinforce the principle that visual identification evidence must be carefully scrutinized to minimize the risk of a miscarriage of justice.
32. The Appellant argued that the Court must be satisfied that the circumstances were favourable and free from the possibility of error before basing a conviction upon such evidence.
33. In conclusion, the Appellant submitted that the appeal should succeed on the identification flaw alone since the cumulative effect of the contradictions and weaknesses in the evidence creates a reasonable doubt in a prudent mind, which, according to the principle cited from *Philip Muiruri Ndaruga V R*, High Court of Kenya at Nyeri Criminal Appeal No: 76 of 2012, entitles the accused to the benefit of the doubt and an acquittal.
34. He submitted in the alternative, that should the conviction be sustained, he urged this Court to exercise its discretion to reduce the life imprisonment sentence to a more favourable term, guided by the precedent set in the case of *Joshua Gichuki Mwangi V R COA at Nyeri Criminal Appeal No: 84 Of 2015*.

### **Analysis and determination**

35. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses. This was elaborated in the case of *Okeno vs. Republic* [1972] E.A 32.
36. Accordingly, upon analysis of the Appeal and the submissions filed, the issues for determination in this matter are;-
  1. Whether the defilement charge against the Appellant was proved beyond reasonable doubt.
  2. Whether the sentence of life imprisonment imposed against the Appellant was justified.
37. On the first issue, section 8(1) and 8(2) of the Sexual offenses Act under which the Appellant was charged provide that:-
 

“8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement (2)A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
38. For the offence of defilement to be established, 3 ingredients must therefore be proved, namely;
  - i. Age of the victim.



- ii. Penetration.
  - iii. Positive identification of the offender.
39. In respect to proof of the “age” of the victim, the Court of Appeal in the case of *Onsongo v Republic* (Criminal Appeal 18 of 2016) [2024] KECA 415 (KLR) (26 April 2024), stated as follows:
- “... 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.”
40. In the present case, the victim testified that she was 7 years old at the time of the incident. Her father (PW2) affirmed that the complainant herein was 7 years old. The issue of age was further ascertained by the production of her Birth Certificate, which was marked as Exhibit 6 and indicates that the complainant was born on 13<sup>th</sup> May, 2013, hence at the time of offense, the complaint herein was 7 years and 3 months old.
41. On the issue of penetration, Section 2(1) of the Sexual offenses Act defines penetration as:-
- “The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
42. The Court of Appeal, in the case of *Mark Oiruri Mose v Republic* [2013] KECA 67 (KLR) held that:-
- “.. In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main 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.”
43. In the present case, the complainant PW1, PCK gave unsworn testimony. She stated that while herding cows, a person came and took her to a maize field, where he told her to lie down and removed her clothes. She stated the assailant removed his “thing for urinating” and placed it on hers. She was threatened not to scream and given Kshs. 10 afterwards.
44. PW2, JK, the victim's father, stated that he found his daughter crying on the fateful day and upon inquiry, she told him that someone took her to a maize field and “did bad manners”.
45. PW5, Judith Muthange, the Investigating Officer, stated that a case of defilement was reported on 19<sup>th</sup> August, 2020, and she was assigned to investigate. She recorded the victim's statement, who narrated to her that the accused person took her to the maize field and defiled her. She noted that the victim was taken to the hospital, which confirmed there was penetration and the doctors' report stated the victim was defiled and the hymen was broken and stains of blood noted in her clothes.
46. PW4, Dr. George Biketi testified that the victim’s inner wear had blood and white discharge. On examination, her hymen was freshly torn and there were injuries on the hymen which were fresh. He produced the P3 form, PRC Form, and laboratory test results as exhibits.



47. Lastly, on identification, the Court of Appeal, in the case of *Wamunga v Republic* [1989] KECA 47 (KLR) cautioned that:-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

48. The core of the prosecution’s case rested on the identification of the assailant, by the victim’s testimony and the accounts of her father and a neighbour.

49. The victim, PW1, provided a positive identification on three separate occasions: when the accused was initially apprehended by members of the public, later at the police station, and subsequently in court.

50. The victim’s father, PW 2, JK, initiated the search based on his daughter’s clear description of the assailant as wearing boots and a blue jacket. He testified that he saw a person matching this description who immediately fled upon noticing him. The father shared this description with neighbours, who eventually apprehended the person.

51. Upon finding the suspect tied up, the father confirmed that his daughter did point the accused person and stated it was the accused person. Furthermore, the neighbour, PW 3, Joseph Cheboi, corroborated this direct identification. He confirmed that when the accused was brought before them, the victim pointed to the accused person as the assailant.

52. The Investigating Officer, PW 5, Judith Mutange, confirmed this sequence of events, stating that the accused was arrested by members of the public and then brought to the Police Station.

53. Based on the testimonies of the witnesses, the incident occurred in broad daylight at around 1300 hours, which strengthens the reliability of the victim’s visual identification. The victim confirmed she saw the accused clearly, noting he even gave her money after the act, which clearly shows that the complainant saw her assailant.

54. Her ability to give a description that led to the accused’s arrest, and her subsequent identification on three distinct occasions, provides compelling evidence of positive identification. In light of the foregoing, this Court is satisfied that the trial Magistrate correctly found that the Appellant had been positively identified. Thus, the ground of Appeal challenging the Appellant’s identification, also fails.

55. Consequently, all the elements of the offence of defilement were established and hence the charge proved as required by law.

56. On whether the sentence of life imprisonment was justified in the circumstances. Section 8(2) of the Sexual offenses Act, as stated above give life imprisonment for a person found guilty of defiling a child aged 11 years and below.

57. The sentence is a mandatory one that cannot be altered by the court and interpreted to give a certain term limit. This was reiterated by the supreme Court in *Republic v Manyeso* (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) where the Apex Court found the life imprisonment was constitutional and the Court of Appeal erred in law by substituting the life imprisonment sentence with a 40-year sentence, thereby usurping the legislative power to define sentences.



58. It is a well-established principle that this Court cannot legislate from the bench. Where the legislature has prescribed a penalty for an offense, the judicial duty is to apply that law as written. In the matter of life imprisonment, the law has not delineated a specific term limit. Consequently, this Court is constrained from interpreting the term life imprisonment to assign a finite duration.
59. The accused person was convicted of defilement of a minor aged seven years. Given that the victim's age falls below the statutory threshold of eleven years, the governing legislation dictates that the only sentence permitted is life imprisonment.
60. This Court cannot depart from the clear mandate of the law by imposing a lesser sentence than that which the Act explicitly provides.
61. In light of the foregoing, this Court makes the following Orders:-
1. The Appellant's Amended Petition of Appeal dated 20<sup>th</sup> October, 2024 is hereby dismissed.
  2. The conviction is upheld and the sentence affirmed.
  3. The Appellant shall continue to serve the sentence as passed by the trial Court.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 5<sup>TH</sup> DAY OF MARCH, 2026.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Waichungo Martin & Co. Advocate for the Appellant

Ms Anyumba for Respondent

Joseph Waweru Muya Appellant

Erickson, Court Assistant

