



REPUBLIC OF KENYA



KENYA LAW
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**Mugendi v Republic (Criminal Appeal E026 of 2024)
[2026] KEHC 2407 (KLR) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E026 OF 2024
RL KORIR, J
FEBRUARY 26, 2026**

BETWEEN

MOSES MUGENDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in SOA
Case No. 49 of 2019 at Principal Magistrate's Court Marimanti
delivered by Hon. Mbayaki Wafula (SRM) on 16th November, 2022)*

JUDGMENT

The Charge

1. Moses Mugendi (Appellant) was charged before the Principal Magistrate's Court at Marimanti with the offence of defilement contrary to section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#), (SOA) 2006. The particulars of the offence were that on diverse dates between 5th October, 2019 and 2nd November, 2019 at [Particulars Withheld] in Tharaka South Sub-County within Tharaka Nithi County, intentionally and unlawfully caused his penis to penetrate the vagina of W.M a child aged 14 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11 of the [Sexual Offences Act](#), where it was alleged that he intentionally touched the vagina of W.M child aged 14 years.
3. At the conclusion of the trial, and through a judgement dated 16th November 2024, the trial court convicted and sentenced him to serve 20 years' imprisonment.
4. The Appellant appealed his conviction and sentence. In his home made Petition of appeal dated 8th July 2024 he raised eight grounds which I have paraphrased as follows:-



- i. That the Prosecution did not discharged its burden of proof and the case was not proved to the required legal standard.
 - ii. That trial court relied on the evidence of the complainant which was untruthful, contradictory and uncorroborated.
 - iii. That the trial court failed to scrutinize and analyze the credibility and integrity of the prosecution witnesses.
 - iv. That the trial court did not give reasons for believing a single eye-witness contrary to Section 124 of the Evidence Act.
 - v. That the trial court rejected the Appellant’s defense without cogent reason.
 - vi. That the sentence imposed was harsh and excessive sentence and did not take into consideration mitigating circumstances.
5. Parties took directions to canvass the appeal through written submissions. The Appellant’s submissions were dated 20th August 2025 while the Respondent’s were dated 21st July 2025.
 6. This being a first appeal, I have a duty to analyse and re-evaluate the evidence which was before the trial court and come to my own conclusion and findings. See Okeno and David Njuguna Wairimu vs. Republic [2010]eKLR.

The Prosecution Case

7. The Prosecution case in the trial court was that the victim (W.M) had left her home in [Particulars Withheld] to visit her grandmother in [Particulars Withheld]. That in between she met the Appellant who took her to his home where he kept her for four days and had repeated sex before she was rescued by the area chief. That upon being rescued, the victim was taken to hospital for medical examination while the Appellant was arrested and later charged.
8. In the trial, the Prosecution called 5 witnesses, being the victim (PW1), the victim’s mother (PW2), the Assistant Chief who rescued the minor (PW3), the Clinical officer (PW4) and the Investigating officer (PW5).

The Defence Case

9. Put on his defense, the Appellant gave sworn testimony in which he denied the offence. He stated that he did not know the complainant and that the charges were fabricated and championed by the assistant chief of Turima who also had a grudge with his (Appellant’s) mother.
10. As earlier stated, the trial court found the Appellant guilty and sentenced him to serve 20 years imprisonment.

Submissions

11. In this appeal, the Appellant submitted that the Prosecution case was not proved to the required legal standard. He took issue with the evidence of the complainant (PW1) which he described as untruthful, contradictory and uncorroborated. He submitted that the trial court did not consider the circumstances of the case urging that the case was a fabrication by the chief.
12. The Respondent on the other hand submitted that all the ingredients of the offence had been proved to the required legal standard.



Issues for determination

13. From my consideration of the grounds of appeal, the trial record and the respective submissions of the parties the main issue for my determination is whether the charge against the Appellant was proved to the required legal standard. This can only be determined through a rigorous analysis of the evidence before the trial court bearing in mind the ingredients of the offence, being; age of the complainant, proof of penetration and the positive identification of the Appellant.

Age of the complainant

14. Proof of the age of the victim is critical in a charge of defilement. This is because the law has provided graduated sentences depending on the age of the victim. The importance of proving the age of the victim was stated by the court in *Hadson Ali Mwachongo vs. Republic* [2016] eKLR thus:-

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In *Alfayo Gombe Okello vs. Republic Criminal Appeal No.203 of 2009 (Kisumu)*. This Court stated as follows:-

‘.....In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim and consequently the age of the victim is necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 8(1).’

15. The victim W.M (PW1) testified that she was 15 years’ old and a student at [Particulars Withheld] Primary School. MK (PW2) who was the complainant’s mother testified that PW1 was about 15 years old. She exhibited [MF1-2] which showed 20th December 2006 as the date of birth. In his testimony (PW3) Assistant Chief Philip M. Njeru (PW3) stated that he rescued W.M a very young girl. The investigating officer produced the Birth Certificate S/N 0672872 as exhibit-3. The Appellant did not cross-examine any of these witnesses on their evidence respecting the age of the victim.
16. The Appellant submitted that PW1 was not a credible witness as she testified that she met the Appellant who was a stranger to her and agreed to go and live with him. He argued that it was not possible for one to go and live with a stranger for a week. He recalled the PW1’s testimony that “He offered to marry me. I just did not reply.” The Appellant submitted,

“PW1 presented to me as orphan and had nobody to help her. She had an ID Card showing that she was over 18 years of age. So I could not take her to be a student.”
17. The Respondent submitted that the complainant was 14 years old as proved by the Birth Certificate [Exhibit 2] which indicated that she was born on 20th December 2006.
18. I have considered the evidence on the age of the victim. The record shows that the evidence of the mother (PW2) that the complainant was 15 years’ old and the observation of the Assistant chief (PW3) that he rescued a young girl was not challenged by the Appellant in cross-examination.
19. I have looked at (Exhibit 3). It shows the date of birth as 20th December, 2006. The offence occurred between 5th October, 2019 and 2nd November, 2019. This means that the victim was then 13 years and 11 months. She had not attained her 14th birthday.



20. It is my finding based on the Birth Certificate [Exhibit 3] that the victim was 13 years old at the time of the offence.
21. I have considered the Appellant's submission that the victim showed him an ID which shows that she was 18 years. This submission does not hold water for several reasons. Firstly, this was not a ground of appeal, secondly; the record shows that the Appellant did not dispute the evidence of age given at the trial, and thirdly, the Appellant gave no evidence to demonstrate that he was misled in believing that the victim was 18 years.
22. In the opinion of this court the victim being 14 years was not close to 18 years as to avail the Appellant the benefit of mistaken belief. I dismiss the Appellant's submission on age as an afterthought.
23. It is my finding therefore based on the Birth Certificate and the evidence of the complainant's mother (PW2) that PW1 was below 18 years of age. She was 14 years at the time of the offence.

Penetration

24. Section 2 of the *Sexual Offences Act* defines "penetration" as the partial or complete insertion of a person into the genital organs of another person." Penetration is usually proved through the evidence of the victim corroborated by medical evidence and circumstantial evidence.
25. The Appellant's submissions on this issue was contradictory. On the one hand he submitted that the entire case was a fabrication and on the other hand, he submitted that the victim deceived him that she was 18 years old and was willing to live with him.
26. The Respondents on the other hand submitted that the act of penetration was proven through the complainant's evidence and medical evidence.
27. In the case of *Bassita vs Uganda S. C Criminal Appeal Number 35 of 1995*, the Supreme Court held that:-

"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence....."
28. In this case the victim was said to have left her home for her grandmother's home. In between she met the Appellant and they lived together. According to the mother (PW2) she thought the daughter was at the grand mother's home all the while.
29. The complainant (PW1) testified as follows:-

"I am W. M. (name redacted) 15 years old. I am a student at [Particulars Withheld] Primary School. I was going to [Particulars Withheld]. I met accused (pointing to accused) who told me that my aunt in Kibung'a was looking for me. He offered to take me to her home. Instead, he took me to his cube. I asked him about my aunt and he refused to show me her house. I do not clearly remember the dates. We lived with him for about a week. He offered to marry me I just did not reply. We used to have sexual intercourse. I was later rescued and accused detained. I was checked at the hospital. I had P3 Form filed. P3 Form- 7th November, 2019 – MF -1. Accused is called Moses Mugendi. I cannot remember the exact it was during the December holiday I had not met accused before (pointing to accused). That is all."



30. The victim's testimony was that she was with the Appellant for 4 days and had sexual intercourse. Her presence in the Appellant's home was confirmed and corroborated by the evidence of the assistant chief (PW3) who rescued her from the said home and arrested the Appellant. The victim was taken to Marimanti Level 4 hospital where she was examined by clinical officer Emilio who filled the P3 Form.
31. Clinical officer Kenneth Mutwiri (PW4) testified on behalf of Emilio his professional colleague. He stated that the victim had claimed that she had been "married" for 2 weeks and had sex. He produced the P3 Report and Laboratory Results as Exhibit 1 and 2 respectively. The P3 stated that genitalia was normal with no tears or bruises and that the hymen was torn though not freshly.
32. The medical evidence above corroborates the testimony of the victim that she had sexual intercourse. There was therefore proof of penetrative sex.
33. Identification of the Accused
- With regard to the issue of identification, the Court of Appeal in the case of Cleophas Wamunga vs Republic(1989)eKLR expressed itself as follows:-
- “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.....”
34. I have closely looked at the identification evidence. The victim (PW1) identified the Appellant as the person whom she had met while on her way to her aunt's home and ended up in his house. She testified that he had asked her to be his wife and they were 'married' for two weeks before the chief arrested them.
35. I am satisfied that he was properly identified as it was a case of recognition. They had lived together for two weeks and in the period had sexual intercourse.
36. The circumstances of arrest further corroborates the victim's evidence that it was the Appellant who had taken her to his house and 'married' her.
37. PW3, the assistant chief testified as follows:-
- “I am Philip M.Njeru Assistant Chief Turima Tweru- with 15 years' experience. Part of my duty is to ensure children go to school. On 2nd November, 2019 I learnt of a girl married in my area. I met the suspect. We went to his home. I found PW1 in his house. I involved other residents and we rescued the victim. She is J.M a very young girl from [Particulars Withheld] area. Accused is the man before court. That is all.”
38. The Appellant stated in his submissions that he believed the victim was 18 years. This was an admission that he was the one who had 'married' the victim.
39. It is my firm finding therefore that the evidence of identification was cogent and unassailable.
40. The Appellant submitted extensively that the evidence was contradictory and lacked corroboration. From my overall appraisal of the record and analysis above, I have not found any material contradiction.
41. One of the grounds of appeal was that the trial court disallowed the Appellant's defence without cogent reason. I have looked at the trial record. The Appellant elected to give sworn evidence. He stated as follows. “I am Moses Mugendi. I am resident of Turima Location. I am a farmer. I did not commit any offence. The charges are a fabrication.” In cross-examination, he denied knowing the complainant and accused the Assistant Chief of Turima of fabricating the case.



42. The trial court in its judgement stated that the accused only indicated that the charges were a fabrication because of a grudge but did not show how the same was connected to the victim and her mother.
43. The Appellant's defense was not a defense at all. It was a mere denial of the offence. I have found nothing in his short statement that would cast doubt on the prosecution's case.
44. It is my finding therefore that the three ingredients of the offence were proven to the required legal standard.
45. With respect to sentence, Section 8(3) provides a mandatory minimum sentence upon conviction as follows:-

“8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.” [Underline mine]
46. It is my considered view that the trial court cannot be faulted for imposing the minimum sentence provided by law.
47. In the final analysis, the Appeal lacks in merit and is dismissed. I uphold both the conviction and sentence.
48. The Appellant has 14 days' right of appeal to the Court of Appeal.

Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT CHUKA THIS 26TH DAY OF FEBRUARY, 2026.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant acting in person. Ms Rukunga for the Respondent, and Muriuki (Court Assistant).

