



REPUBLIC OF KENYA



**Mwangi v Republic (Criminal Appeal E056 of 2024)
[2026] KEHC 2727 (KLR) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2727 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E056 OF 2024
TW CHERERE, J
FEBRUARY 26, 2026**

BETWEEN

DAVID NYAMACHE MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from conviction and sentence in Keroka MCSO
14 of 2020 of by Hon. Ombija (SRM) on 11th January 2024)*

JUDGMENT

1. The Appellant, David Nyamache Mwangi, was charged before the Chief Magistrate's Court at Keroka with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the charge alleged that on the 07th March, 2020, at Ensinyo Sub-Location, Kinani Location, Borabu Sub-County, Nyamira County, the Appellant intentionally caused his penis to penetrate the vagina of SM, a child aged 12 years.
2. In the alternative, the Appellant faced a 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 being that he touched the vagina of the said SM.
3. The Appellant entered a plea of not guilty to both counts. After a full trial in which the prosecution called six (6) witnesses.
4. The prosecution's case, as gleaned from the evidence on record, may be summarised as follows. On 07th March 2020, PW1 (SM), who was then 12 years old and a Class 1 pupil at [Particulars Withheld] Primary School, was sent by one Naomi, a visitor at her home, to collect a mobile phone from a charging shop at a nearby shopping centre. While on her way back home, she encountered the Appellant, whom she had earlier seen behind his house. The Appellant, who was a neighbour and



- known to her, called her and led her towards the same house. Once there, he removed her skirt, shirt and pant; he also removed his own clothing and laid her on the ground. He thereafter inserted his penis into her vagina, injuring her. When he was done, he released her to go home.
5. PW2, JMM, who had employed the Appellant as a farm labourer, had assigned the Appellant some duties. When PW2 came back to the farm to supervise, he found the Appellant lying on top of PW1, pants down, in the act of sexual intercourse. He raised an alarm, calling a female neighbour and other villagers, including the Victim's mother. The matter was escalated to the police.
 6. PW3, Naomi Kwamboka, a resident of [Particulars Withheld], confirmed that she was familiar with the Appellant. She testified that on 07th March 2020, she was at home with PW1 (her younger sister). She corroborated the sequence of events, confirming how the minor was accosted on her way back, led into a compound and defiled. She stated that PW1 narrated to her, and confirmed to her mother and the police, how the Appellant defiled her.
 7. PW4, Hellen Nyambeka Machuka, a clinical officer at Kijauri Sub-County Hospital, examined PW1 on 07th March 2020, approximately 4 hours after the alleged incident. On examination she found that the hymen was absent, the labia minora was lacerated, and the lacerations were fresh, consistent with recent penetration. PW4 filled and produced the P3 Form (P. EXBT 1) and the treatment notes (P. EXBT 2). She concluded that the minor had been defiled.
 8. PW5, No. 23xxx Cpl Fredrick Nganda, worked at Riontonyi Police Station. He was not the investigating officer but was at the police station when the PW2 brought PW1 and reported a case of defilement. He received the report and was part of the team that visited the scene.
 9. PW6, No. 23xxx Inspector Beatrice Luvembe, was the investigating officer. She testified that on 07th March 2020 she was assigned this defilement case. She visited the scene with other officers and established that the offence had been committed. The Accused had already been arrested by members of the public. She took PW1's statement and escorted both PW1 and her mother to Kijauri Sub-County Hospital for medical examination. She confirmed conducting investigations, recording statements from all witnesses, and produced the birth certificate of PW1 as P. EXBT 3, confirming she was born on 12th January 2008 and was therefore 12 years old at the time of the offence.
 10. In his defence, the Appellant gave a sworn statement in Ekegusii, denying committing the offence. He stated he understood the charge and denied it. He acknowledged that on 07th March 2020, he was at home. He claimed that JM woke him up to work at the shamba. He went to work and, after finishing, returned home around 1:00 pm, at which point police arrived and arrested him. He denied having encountered or defiled PW1 on any road. He stated he first met PW1 in court. He called no witness.
 11. At the close of the prosecution and defence cases, the trial magistrate found the Appellant guilty on the main count, convicted him and sentenced him to serve twenty (20) years imprisonment. The sentence was ordered to run from 09th March 2020 being the date of Appellant's arrest.
 12. Aggrieved by both the conviction and sentence, the Appellant filed this appeal raising three (3) substantive grounds, namely:
 1. That the offence of defilement was not proved to the required standard of proof beyond reasonable doubt;
 2. That the prosecution witnesses contradicted themselves, thereby rendering the conviction unsafe; and



3. That the sentence of 20 years' imprisonment is harsh, excessive and punitive in the circumstances.
13. When the appeal came up for hearing, the appellant relied on his grounds of appeal and, in his oral submissions, pleaded for forgiveness and leniency.
14. The Respondent's written submissions dated 03rd September 2025 oppose the appeal in its entirety and urge the Court to uphold both conviction and sentence. The Respondent submits that all the essential ingredients of the offence of defilement were proved beyond reasonable doubt, namely the age of the complainant, proof of penetration, and positive identification of the perpetrator. On age, it is submitted that PW1 testified she was 11 years old at the time of the offence and that the investigating officer, produced her birth certificate showing she was born on 12th January 2008. The Respondent contends that this documentary evidence conclusively established that the complainant was a minor aged 12 years at the material time.
15. On penetration, the Respondent relies on the testimony of PW1 who narrated how the appellant removed her clothes, inserted his penis into her vagina and injured her. Further reliance is placed on the evidence of PW2 who testified that he found the appellant in the act with the complainant. The medical evidence of PW4, the clinical officer, is cited as corroborative; upon examination, the hymen was found absent and there were fresh lacerations on the labia minora. The P3 form and treatment notes were produced in evidence. The Respondent therefore maintains that penetration was proved both by direct testimony and medical findings.
16. Regarding identification, the Respondent submits that the complainant knew the appellant prior to the incident and identified him as the person who defiled her. PW2 equally knew the appellant well and stated that he found him in the act. It is contended that this was a case of recognition and that identification was free from the possibility of error.
17. As to the alleged contradictions, the Respondent argues that the appellant did not specify any material inconsistencies in the prosecution case. It is submitted that there were no material contradictions and that, in any event, any minor discrepancies would be curable under section 382 of the [Criminal Procedure Code](#).
18. This Court, sitting as a first appellate court, is enjoined to revisit, re-evaluate and re-analyse the evidence on record, draw its own conclusions and determine whether the trial court's findings were supported by the evidence. The Court must however give due allowance for the fact that it did not see or hear the witnesses testify. (See *Okeno v. Republic* [1972] EA 32.)
19. From the evidence on record, the following issues arise for determination:
 1. Whether the age of the victim was proved beyond reasonable doubt;
 2. Whether penetration was proved beyond reasonable doubt;
 3. Whether the Appellant was positively and properly identified as the perpetrator;
 4. Whether there were material contradictions in the prosecution's evidence that render the conviction unsafe; and
 5. Whether the sentence of 20 years' imprisonment is lawful and/or excessive in the circumstances.
20. The age of the victim is a critical ingredient in a defilement charge, the proof of which must be established beyond reasonable doubt. The law is settled that the age of the victim can be proved by



any one or combination of the following: production of a birth certificate; testimony of the parent or guardian; a medical assessment of age; or by observing the victim.

21. In the present case, PW1 testified that she was 11 years old when the offence was committed. The birth certificate, produced as P. EXBT 3 by the investigating officer PW6, confirms that SM was born on 12th January 2008. Accordingly, at the time of the offence, she was precisely 12 years and approximately 55 days old.
22. Consequently, I find that the trial magistrate correctly found that the age of the victim was proved beyond reasonable doubt.
23. Section 2 of the *Sexual Offences Act* No. 3 of 2006 defines 'penetration' to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. Proof of even the slightest degree of penetration suffices.
24. PW1 gave a clear, cogent and internally consistent account of what befell her. She narrated how the Appellant removed her clothing, laid her on the ground, inserted his penis into her vagina, and injured her. Her testimony was that of a child of tender years, given in Kiswahili, and the trial court was satisfied with its truthfulness. Her account was corroborated by PW2, who found the Appellant in the act lying on top of PW1 with his pants down, in the act of sexual intercourse.
25. The medical evidence powerfully corroborates the testimonial evidence. PW4, the clinical officer, found that the hymen was absent, the labia minora was lacerated, and the lacerations were fresh—consistent with recent penetration occurring within 4 hours prior to examination. The P3 Form (P. EXBT 1) and treatment notes (P. EXBT 2) record these findings. The clinical officer concluded that the minor had been defiled and that there was evidence of penetration.
26. The convergence of PW1's direct testimony, PW2's eyewitness account of the Appellant in the act, and PW4's clinical findings leave no doubt whatsoever that penetration occurred and was proved beyond reasonable doubt.
27. The Appellant denied ever having met PW1 before their encounter in court, and denied being at the scene. The question is therefore whether the identification evidence adduced by the prosecution was reliable and sufficient to found a conviction.
28. The conditions for identification in this case were singularly favourable. The incident occurred during broad daylight. PW1 knew the Appellant before the incident, having seen him behind his house. She identified him as 'David', a name the Appellant himself does not dispute. PW1 positively identified the Appellant as the person who defiled her. PW2, the Appellant's own employee, found the Appellant red-handed, lying on top of PW1 in the act of sexual intercourse. PW2 knew the Appellant very well as his employer. The Appellant was identified not merely by a fleeting glance, but was caught in the very act by an independent eyewitness.
29. On cross-examination, the Appellant himself acknowledged that on the day in question he was in the vicinity and that Appellant's employer JM had assigned him duties. He even confirmed in his cross-examination by the Respondent that he was employed by the said farm and was at the location. His attempt to distance himself from the scene is contradicted by his own admission.
30. This Court is satisfied that the identification of the Appellant as the perpetrator was positive, reliable and compelling and the trial court was fully justified in accepting this evidence.
31. The Appellant's second ground of appeal is that the prosecution witnesses contradicted themselves. However, as the Respondent correctly observes in its written submissions, the Appellant has not in his



petition of appeal or in his oral submissions identified the specific witnesses who allegedly contradicted each other, or the specific aspects of the evidence said to be contradictory.

32. In *Richard Munene v Republic* [2018] KECA 186 (KLR), the court of appeal emphasized that contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable.
33. This Court has carefully re-evaluated the evidence of all six prosecution witnesses and finds no contradictions in their testimony and none was identified by the Appellant.
34. The Appellant was convicted of defilement of a child between the age of twelve (12) and fifteen (15) years contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. Section 8(3) provides:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to a term of imprisonment of not less than twenty years.”
35. The sentence of twenty (20) years' imprisonment imposed by the trial court is the mandatory minimum prescribed by the statute and this Court has no jurisdiction to depart below the mandatory minimum sentence prescribed by law. (See *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae)* [2021] KESC 31 (KLR) (“Muruatetu 2”),
36. The Appellant's plea for pardon while noted, cannot override a mandatory statutory minimum sentence.
37. In the end, the appeal is dismissed and the conviction and sentence of 20 years' imprisonment imposed by the trial court is confirmed.

DELIVERED AT NYAMIRA THIS 26th DAY OF February 2026

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Anita

Accused - Present in person

For the DPP - Ms. Kiptanui

