

JUDGMENT
HCCRA E065 OF 2024



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
CHERERE-J
HCCRA E065 OF 2024

BETWEEN
ROBERT MAKORI
SAMSON..... APPELLANT
AND
REPUBLIC RESPONDENT
..... RESPONDENT

**(Being an appeal from the sentence in Keroka MCSO E091
of 2023 by Hon. E.K.Nyutu (CM) on 25th
September 2024)**

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Background

1. The Appellant, Robert Makori Samson, was charged in Keroka MCSO E091 of 2023 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006.
2. The particulars of the offence were that between 27th October 2023 and 01st November 2023, at Riamakanda location in Masaba South Sub-County within Kisii County, the Appellant intentionally and unlawfully caused penetration of his genital organ into the genital organ of M.N.O aged ten years.

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3. 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.
4. The Appellant pleaded not guilty to both the main and alternative counts.
5. The prosecution called three witnesses in support of its case, including the complainant, a police officer, and a clinical officer.
6. Upon the close of the prosecution case, the trial court found that the Appellant had a case to answer. The Appellant tendered a sworn defence and denied committing the offence.
7. After evaluating the evidence, the learned trial magistrate found the Appellant guilty on the main count of defilement. The Appellant was consequently convicted and sentenced to life imprisonment pursuant to section 8(2) of the Sexual Offences Act.

Grounds of appeal

8. Being dissatisfied with both conviction and sentence, the Appellant lodged the present appeal on the grounds that:

1) The learned trial magistrate erred in law and fact by failing to hold that it was unsafe to convict him.

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- 2) The prosecution failed to prove its case beyond reasonable doubt.
- 3) The trial court failed to apply constitutional principles on sentencing as articulated in **Francis Karioko Muruatetu & Another v Republic, Supreme Court Petition No. 16 of 2015.**
- 4) The decision of the trial court was against the weight of evidence.

Submissions

9. Directions were given that the appeal be canvassed by way of written submissions which both parties duly filed.
10. The Appellant filed written submissions dated 14th November 2025 through Bosire Gichana & Company Advocates. Counsel submitted that the evidence on record was inconsistent and insufficient to sustain a conviction. It was argued that penetration was not proved beyond reasonable doubt and that the medical evidence was circumstantial.
11. Counsel further submitted that the Appellant's defence was not adequately considered.
12. On sentence, reliance was placed on **Francis Karioko Muruatetu & Another v Republic** (supra) and **Hadson Ali**

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Mwachongo v Republic [2016] eKLR, in support of the argument that the trial court failed to exercise discretion.

13. Counsel also relied on **State v Toms; State v Bruce (1990) SA 802 (A)** and **Mithu Singh v State of Punjab, Criminal Appeal No. 745 of 1980, AIR 1983 SC 473**, to advance principles of proportionality in sentencing.

14. The Respondent filed written submissions dated 17th December 2025 through Mwangi David, Principal Prosecution Counsel.

15. The Respondent submitted that the conviction was supported by overwhelming evidence. It was contended that the prosecution proved the age of the complainant, penetration, and the identity of the perpetrator beyond reasonable doubt.

16. On sentence, the Respondent relied on **Republic v Joshua Mwangi, Initiative of Strategic Litigation in Africa (ISLA) & 2 Others, Supreme Court Petition No. E018 of 2023** for the proposition that the decision of the Supreme Court in **Francis Karioko Muruatetu & Another v Republic** (supra) is confined to the mandatory death sentence under section 204 of the Penal Code and does not apply to mandatory or minimum sentences prescribed under the Sexual Offences Act, and further that trial and appellate

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courts lack jurisdiction, in the absence of a properly instituted constitutional petition, to disregard or re-write sentencing provisions enacted by Parliament.

Issues for Determination

17. This being a first appeal, this Court is under a duty to re-evaluate the evidence and draw its own conclusions. That duty was articulated in **Okeno v Republic [1972] EA 32**.

18. Having considered the grounds of appeal and submissions, I the issues that arise for determination are:

- 1. Whether the age of the complainant was proved beyond reasonable doubt**
- 2. Whether penetration was proved.**
- 3. Whether the identity of the perpetrator was established**
- 4. Whether the Appellant's defence was considered.**
- 5. Whether the sentence imposed was lawful and justified.**

Analysis and Determination

19. Age is a critical element in the offence of defilement and must be proved beyond reasonable doubt. In **Fappyton Mutuku Ngui v Republic [2014] KECA 570 (KLR)**, the Court of Appeal held that age may be proved through documentary or other credible evidence.

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20. The complainant's date of birth was shown to be 10th June 2013, and the offence was alleged to have been committed between 27th October 2023 and 1st November 2023, during which period she had not yet attained the age of eleven years.
21. That evidence on age was not challenged during cross-examination and was accepted by the trial court. Guided by the holding of the Court of Appeal in **Fappyton Mutuku Ngui v Republic** (supra), I am satisfied that the age of the complainant was proved beyond reasonable doubt.
22. On the issue of penetration, the trial court found that the complainant's evidence was clear, consistent and credible. That evidence was supported by medical findings contained in the Post Rape Care (PRC) Form dated 01st November 2023, which recorded bruises on both sides of the labia majora, and the P3 Form dated 08th November 2023, which documented bruises on both labia, noted that the hymen was already broken, and recorded the presence of spermatozoa, pus cells and epithelial cells in the vaginal swab.
23. In terms of section 2 of the Sexual Offences Act, penetration is defined as the partial or complete insertion of the genital organs of a person into the genital organs of

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another. Proof of penetration does not require proof of rupture of the hymen, ejaculation, or the presence of injuries.

24. In the circumstances of this case, and as correctly found by the trial court, the complainant's evidence, taken together with the medical findings, was sufficient to establish penetration within the meaning of the law. I find no basis for interfering with the trial court's conclusion that the element of penetration was proved beyond reasonable doubt.

25. The complainant testified that the appellant was her neighbour, a fact which the appellant himself confirmed in his defence. He did not dispute that he was well known to the complainant. This was therefore a case of recognition, rather than identification of a stranger.

26. The complainant further testified that the offence was committed on several occasions, giving her sufficient opportunity to recognise the appellant. Her evidence on the identity of the appellant was consistent and remained unshaken on cross-examination.

27. Applying the principles enunciated in **Sumba v Republic [2024] KECA 521 (KLR)**, recognition is more reliable than identification of a stranger, particularly where the parties are known to each other. In the circumstances of this case, I am

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satisfied, as was the trial court, that the identification of the appellant was proper and free from the possibility of error.

28. The appellant contends that the learned trial magistrate failed to consider his defence.

29. The record shows that upon being placed on his defence, the appellant gave sworn evidence, which was duly recorded by the trial court. In the impugned judgment, the trial magistrate addressed the appellant's defence and weighed it against the prosecution evidence. The court found that the defence did not displace the consistent testimony of the complainant, which was corroborated by medical evidence.

30. It is settled law that a trial court is not required to accept a defence merely because it has been offered. What is required is that the defence be considered. Rejection of a defence does not, of itself, amount to failure to consider it.

31. Upon my own re-evaluation of the record, I am satisfied that the appellant's defence was considered but found wanting in light of the prosecution evidence. I find no misdirection on the part of the trial court in this regard.

32. Accordingly, the ground of appeal alleging failure to consider the defence fails.

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33. The Appellant challenged the sentence of life imprisonment imposed under section 8(2) of the Sexual Offences Act, placing reliance on **Francis Karioko Muruatetu & Another v Republic [2017] eKLR.**
34. The scope of the **Muruatetu 1** decision was, however, conclusively clarified by the Supreme Court in **Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] KESC 31 (KLR)** (“*Muruatetu 2*”).
35. In **Muruatetu 2** (supra), the Supreme Court categorically held that the decision declaring the mandatory death sentence unconstitutional was confined to murder cases under section 204 of the Penal Code and did not extend to other offences carrying mandatory or minimum sentences.
36. That clarification was subsequently applied and reaffirmed by the Supreme Court in **Republic v Joshua Mwangi, Initiative of Strategic Litigation in Africa (ISLA) & 2 Others** (supra).
37. The Appellant’s reliance on **Hadson Ali Mwachongo v Republic** (supra) and the foreign authorities cited must therefore be read subject to the binding clarification in **Muruatetu 2** (supra) as reaffirmed in **Republic v Joshua**

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Mwangi, Initiative of Strategic Litigation in Africa
(ISLA) & 2 Others (supra).

38. The decisions of the Supreme Court are binding on this Court, and neither persuasive foreign authorities nor decisions of courts of equal or lower jurisdiction can override or dilute that binding precedent.
39. In the circumstances of this case, the trial court was bound by statute to impose the sentence of life imprisonment prescribed under section 8(2) of the Sexual Offences Act.
40. I therefore find no error of law or principle in the sentence imposed and the appeal against sentence therefore fails.

Disposition

41. Having re-evaluated the entire record, I find that:
- 1) The prosecution proved its case beyond reasonable doubt.**
 - 2) The trial court properly evaluated the defence.**
 - 3) The sentence imposed was lawful and justified.**
 - 4) The appeal against conviction is without merit.**
 - 5) The appeal against sentence is equally without merit.**
 - 6) The appeal is dismissed in its entirety.**
 - 7) The conviction and sentence of life imprisonment are upheld.**

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DELIVERED AT NYAMIRA THIS 05th **DAY OF**
February **2026**



WAMAE.T. W. CHERERE
JUDGE

Appearances

Court Assistant - Terer

Appellant - Present in person

For the DPP - Ms. Mochama