Mwinzi v Republic (Criminal Appeal E061 of 2023)
[2026] KECA 543 (KLR) (13 March 2026) (Judgment)

Neutral citation: [2026] KECA 543 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E061 OF 2023

SG KAIRU, AK MURGOR & P NYAMWEYA, JJA

MARCH 13, 2026

BETWEEN

JACKSON WAMBUA MWINZI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against the Judgement of the High Court of Kenya at Mombasa (A. Ong'injo, J.) delivered on 29th January, 2021 in Mombasa Criminal Appeal No. 107 of 2019)

JUDGMENT

1. This is a second appeal from the Judgment of the High Court of Kenya at Mombasa (A. Ong'injo J.) delivered on 29th January 2023. The original conviction was by the Chief Magistrate's Court at Kwale (Hon. T.A Sitati PM) in a judgment delivered on 30th August 2019 in Sexual Offence Case No. 74 of 2017.

2. The Appellant was charged 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. The particulars were that on 30th July 2017 he unlawfully and intentionally inserted his penis into the vagina of DNJ, PW2 the complainant, a girl aged 8 years old.

3. He was also charged with an alternative count of committing an indecent act to a child contrary to Section 11(1) of the Act. The particulars were that on the same day in the same area he unlawfully and intentionally touched the vagina of the complainant.

4. In count 2, he was charged with the offence of sexual assault contrary to Section 5(1)(a) as read with Section 2 of the *Sexual Offences Act*. The particulars were that on the same day and in the same area he intentionally and unlawfully caused his finger to penetrate the vagina of the complaint.

5. The Appellant denied the charges and the case proceeded to hearing where the prosecution called 5 witnesses in support of its case.

6. MM, PW1 the complainant's mother, testified that on 30th July 2017, her stepdaughter, aged about 8 years, complained of pain while passing urine. She noticed an unusual smell from the child's private parts, prompting her to question her. The child informed her that a person known as 'Baba Teresia' had made her lie down and inserted his male organ into her genitalia and later inserted his fingers. PW1 took the child to hospital and also reported the matter to the police. Members of the public later arrested the suspect.

7. The complainant who testified as PW2, told the court that Baba Teresia bought her chapatti and beans and asked her to accompany him to his house. Once inside, he made her lie down, removed her clothes, and inserted his penis into her vagina. He then urinated in her vagina and threatened to kill her should she disclose the incident. The incident act occurred in his iron- sheet house. She later disclosed the incident to her mother after experiencing pain while urinating. PW2 identified Baba Teresia as the perpetrator.

8. JR. PW3, a neighbour to the Appellant and the complainant's father, stated that after the child identified the Appellant as the perpetrator, he (the Appellant) confronted him and stated that whenever he bought food or sweets for the child, she had to repay him. PW3 reported the matter to the village elders, and together with other villagers, arrested the Appellant at Ushago Bar and escorted him to Diani Police Station.

9. Police Constable Lilian Wangui No. 104498 PW4, was the investigating officer. She recorded witness statements, issued a P3 form, re-arrested the suspect, and arraigned him in court after medical examinations that confirmed there was defilement. She also escorted the Appellant for medical examination and produced the age assessment report.

10. Philip Bett Chebii, PW5, a Clinical Officer at Msambweni Hospital, examined the complainant on 5th August 2018, following a complaint of defilement by a person known to the complainant. His examination showed that the hymen was broken, poor hygiene, absence of syphilis, and presence of pus cells in urine. He concluded that the complainant had been defiled and produced an age assessment report, a P3 form, a Post Rape Care form, and treatment notes as prosecution exhibits.

11. In his defence, the Appellant gave an unsworn statement in which he denied the charges. He stated that he had a disagreement with the complainant's mother over alleged trespass on his land. He produced his own P3 form to demonstrate that he had no medical condition linking him to the offence that he was HIV negative yet the complainant tested HIV positive. He further stated that his act of buying chapatti and beans for his daughter and the complainant led to him to being suspected. He stated that he was a law-abiding citizen, and that the complainant admitted that he did not remove her clothes. He claimed that the case was intended to tarnish his reputation, that there was a delay in reporting the offence, and that there were no vaginal lacerations.

12. Upon considering the matter, the trial court found that the age of the complainant was proved to the required standard, and that the Appellant's identity was not in dispute, as he was known to the complainant. The court also found that the complainant's testimony was supported by the medical evidence of the clinical officer that found that the hymen was broken and there was the presence of pus cells in the urine all of which were consistent with penetration. Based on the evidence the court concluded that the complainant had been defiled.

13. In addition, the court relied on res gestae evidence under Section 6 of the *Evidence Act* to find that the Appellant's remarks to the complainant's father, that the child was expected to repay him for food, supported the prosecution's case and demonstrated improper motive.

14. Ultimately, the trial court found that the prosecution had proved the charges beyond reasonable doubt. The Appellant's defence was found to be an afterthought, and he was accordingly convicted on counts I and II under Section 215 of the Criminal Procedure Code and sentenced to serve life imprisonment.

15. Aggrieved by the conviction and sentence, the Appellant filed an appeal to the High Court in which he contended that the learned trial Magistrate was in error in, misapprehending and misapplying the requirements of Section 200 of the Criminal Procedure Code; in misrepresenting the evidence; in finding that he was positively identified as the perpetrator of the alleged defilement, and in convicting him against the weight of the evidence.

16. In its Judgment, the High Court reaffirmed that the prosecution had proved all the essential ingredients of the offence beyond reasonable doubt; that the age of the complainant was conclusively proved through the age assessment report; that penetration was established through both the complainant's testimony and the medical evidence, which showed a broken hymen and other indicators consistent with sexual penetration, and that the Appellant was positively identified. Consequently, the appeal was found to be devoid of merit and was dismissed in its entirety, and the conviction and sentence upheld.

17. Dissatisfied the Appellant has filed this appeal on grounds that; he was not afforded a fair trial: that Section 151 of the Criminal Procedure Code was not complied with; in failing to consider his sworn defence which was not impaired by the un-investigated police case; in failing to comply with Section 302 of the Criminal Procedure Code; and in convicting him with the ingredients of the offence being proved beyond reasonable doubts.

18. In his supplementary grounds, the Appellant contended that; the two courts failed to appreciate that there were contradictions and inconsistencies in the evidence that dislodged the prosecution's case.

19. When the appeal came up for hearing on a virtual platform the Appellant appeared in person while learned prosecution counsel Mr. Sirima appeared for the Respondent. Prior to relying on his written submissions, the Appellant orally submitted that his imprisonment had caused significant problems for his family, as he was the sole bread winner; that the piece of land he had purchased in Ukunda was repossessed and his children no longer had a place to live. He pleaded for mercy and to be released from prison, particularly as the complainant and her relatives had forgiven him.

20. It was the Appellant's submission that the conviction was unsafe as the prosecution failed to prove all the essential elements of the offence beyond reasonable doubt; that the courts below failed to appreciate the material contradictions and inconsistencies in the prosecution case which, taken cumulatively, rendered the evidence unreliable and incapable of sustaining a conviction.

21. The Appellant further submitted that he was not properly identified. He contended that although the complainant referred to the assailant as "someone well known," no name was given at the earliest opportunity, and the later attribution of the offence to him amounted to an afterthought. The Appellant relied on the cases of Francis Muchiri Joseph vs Republic [2014] eKLR and Lesarau vs Republic [1988] KLR 783, for the proposition that where

    identification is based on recognition, the name of the assailant ought to be disclosed at the first report, and failure to do so weakens the probative value of subsequent identification. He further cited the case of Terekali s/o Korongozi & Another vs Rex [1925] EACA 59 to underscore the importance of first reports in testing the truth and accuracy of later testimony.

22. On the element of penetration, the Appellant submitted that the medical evidence was inconclusive and inconsistent; that the doctor's testimony did not establish existence of a fresh injury or link the alleged penetration to him, and that the finding of "no injury assessed" contradicted the conclusion classifying the degree of injury as defilement. He argued that, in the face of such inconsistencies, the prosecution evidence could not safely support a conviction.

23. Regarding age, the Appellant submitted that the prosecution failed to properly prove the complainant's age. He contended that the age assessment document was not duly produced and proved in evidence, having been merely marked for identification, contrary to the law of evidence. He relied on Michael Hausa vs The State [1994] 7–8 SCNJ 144, for the proposition that a document marked for identification but not admitted in evidence cannot form the basis of a conviction.

24. Finally, the Appellant submitted that his defence was not displaced by the prosecution evidence and was wrongly disregarded by the courts below. He maintained that, when the totality of the evidence is considered alongside the unresolved contradictions, the prosecution case fell short of the required standard, and that the benefit of doubt ought to have been resolved in his favour.

25. On their part, counsel for the Respondent submitted that the appeal is without merit and should be dismissed in its entirety, as the prosecution proved the charge of defilement beyond reasonable doubt and both the trial court and the first appellate court properly evaluated the evidence and correctly applied the law.

26. It was submitted that all the essential ingredients of the offence of defilement the age of the complainant, proof of penetration, and positive identification of the appellant were fully established. On age, it was submitted that the complainant was assessed to be 8 years old and the age assessment report was properly produced, thereby establishing the complainant's age.

27. In relation to penetration, counsel submitted that the complainant's testimony was clear, cogent, and corroborated by medical evidence, and that penetration need not be complete, as even partial penetration will suffices. In support, reliance was placed on the case of Mark Oiruri Mose vs Republic [2013] eKLR, for the proposition that penetration need not be deep nor accompanied by spermatozoa.

28. Regarding identification, counsel submitted that this was a case of recognition, as the Appellant was well known to the complainant as a neighbour, who was referred to as "Baba Teresia," and for this reason, there was no possibility of a mistaken identity.

29. On the allegation of denial of a fair trial, counsel submitted that the claim was vague, unsupported, and was being raised for the first time before this Court.

30. Counsel further submitted that there was full compliance with Section 151 of the Criminal Procedure Code, as the trial court properly conducted a voire dire examination and correctly received the minor's unsworn testimony. Similarly, it was submitted that Section 302 of the Criminal Procedure Code was inapplicable, and that the appellant was afforded full opportunity to cross-examine witnesses in compliance with Section 208 of the Code.

31. On alleged contradictions and inconsistencies, counsel submitted that none were material or capable of vitiating the prosecution case.

32. Finally, on the sentence, counsel submitted that the life imprisonment imposed was lawful, mandatory, and proportionate under Section 8(2) of the *Sexual Offences Act*, given the age of the complainant and the gravity of the offence. Counsel urged that the appeal be dismissed.

33. This being a second appeal, the Court is limited by virtue of Section 361 of the Criminal Procedure Code to considering matters of law only. The Court's jurisdiction was succinctly set out in the case of Karingo vs R [1982] KLR 213 as follows:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja - vs- R (1956) 17 EACA 146)"

34. Having considered the record, the grounds of appeal and the submissions of both parties the issues that arise for determination are:

    i. Whether the elements of defilement were proved beyond reasonable doubt.

    ii. Whether there were inconsistencies in the prosecution's case.

    iii. Whether the trial Court and first appellate Court considered the appellant's defence

    iv. Whether the trial Court and First appellate Court failed to comply with Section 151 of the Criminal Procedure Code.

    v. Whether the trial Court and first appellate Court failed to comply with Section 302 of the Criminal Procedure Code.

35. Turning first to whether the elements of defilement were proved beyond reasonable doubt, the Appellant was convicted under Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:

> " (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".

36. Further, penetration is defined under Section 2 of the *Sexual Offences Act* as, "the partial or complete insertion of the genital organs of a person, into the genital organs of another person."

37. The provision is therefore clear that, the essential ingredients the prosecution is required to prove beyond reasonable doubt in order to sustain a charge of defilement are: first, proof of penetration, whether partial or complete; second, proof that the complainant was a child under the age of 11 years at the time of the alleged offence; and third, proof that the appellant was positively identified as the person who committed the act of penetration. These elements were succinctly restated in the case of Owino vs Republic, Criminal Appeal No. 138 of 2018 [2024] KECA 43 (KLR).

38. To begin with penetration in this case was established through the evidence of the complainant who testified that the she went to the Appellant's house where he defiled her.

39. In so far as the complainant's evidence is concerned, Section 124 of the *Evidence Act* clearly specifies that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical

evidence is not mandatory under that proviso, a position which was reiterated thus by this Court in the case of George Kioji vs Republic, Cr. App. No. 270 of 2012 (Nyeri):

> “ Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

40. In this case, the trial court carefully analyzed the complainant’s evidence which taken together with the rest of the prosecution case, including the evidence of the Philip Bett Chebii, a Clinical Officer at Msambweni Hospital and found it to be truthful, consistent and coherent, and pointed to the Appellant as the perpetrator who defiled her. On the strength the evidence, both the trial court and the High Court were satisfied that penetration was proved.

41. As pertains to the age of the complainant, it is the Appellant’s case that the prosecution failed to properly prove the complainant’s age. He contended that the age assessment document was not duly produced to evidence, having been merely marked for identification.

    Rule 4 of the Sexual Offences Rules, 2014 provides that:

> “ When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents.”

42. In the case of Francis Omuroni vs Uganda, Court of Appeal Criminal Appeal No 2 of 2000 it was held that:

> “ In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense....”

    In addressing the issue of her age, the High Court had this to say:

> “The issue of the child’s age does not seem to be a matter of contention as the prosecution produced complainant’s assessment report as proof of her age which indicated she was 8 years old at the time of the offence. The Appellant also agreed that the complainant was his daughter’s agemate.”

43. A consideration of the record shows that the age assessment report was produced as evidence by the PW5, the Clinical officer together with the P3 form and the Post Rape care form and indicated that the complainant was 8 years old. The Appellant did not object to its production, and on this basis the court was entitled to rely on the age assessment report that proved that the complainant was 8 years old.

44. But that is not all. The age of the complainant was also established through the evidence of the complainant’s mother and father PW1 and PW3, and the P3 form and Post Rape Care Form. As observed by the learned Judge, the Appellant did not object to the complainant’s age, and therefore he

has no basis on which to deny, that at the time of the offence, the complainant was 8 years old. As a consequence, there is no question that the complainant's age was properly proved.

45. On identification, the Appellant challenged the concurrent findings of the trial court and the first appellate court on identification. The evidence on record demonstrated that this was not a case of fleeting or dock identification, but one of recognition. The complainant testified that the perpetrator was a person well known to her, and was referred to as "Baba Teresia," a neighbour with whom she had prior interaction. She was able to identify the Appellant by name to her mother and other witnesses shortly after the incident. The Appellant himself admitted that he had bought food for her on the material day, thereby placing himself in close and direct contact with the child shortly before the incident.

46. It is settled law that recognition is more reliable and more assuring than the identification of a stranger, as it is based on prior knowledge of the assailant, as stated in the case of Anjononi & Others v Republic [1976–1980] KLR 1566 that recognition depends upon personal knowledge of the assailant and carries greater probative value than visual identification of an unknown person.

47. The circumstances of the offence further negate the possibility of mistaken identity because the incident occurred in daylight, inside the Appellant's house, and involved prolonged interaction. The complainant gave a consistent account of events and identified the Appellant by name at the earliest reasonable opportunity. There was therefore no danger of error in his identification. Both courts below correctly treated the evidence of identification as one of recognition and were entitled to rely on it.

48. On the contradictions, the Appellant contends that the prosecution case was marred by contradictions and inconsistencies which rendered the conviction unsafe.

49. In the case of Richard Munene vs Republic [2018] eKLR, with regard to

50. contradiction or inconsistency in the evidence of the prosecution witnesses this Court stated:

> " Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.
>
> It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

51. It is settled law that not every discrepancy or inconsistency in the prosecution evidence is fatal to a conviction. Only contradictions that are material, grave, and go to the root of the prosecution case that can justify appellate interference. Minor discrepancies, which are inevitable in human testimony, do not vitiate an otherwise cogent and credible case.

52. In the present appeal, the Appellant made mere general allegation that contradictions existed without identifying specific instances or demonstrating how such inconsistencies undermined the essential ingredients of the offence, this ground has no merit.

53. With respect to the failure by the trial court and the 1st appellate court to consider his defence, a perusal of the record shows that learned magistrate expressly considered the Appellant's defence, in which he denied the charges and alleged that the case was fabricated due to a land dispute with the complainant's family. The trial court evaluated that defence in light of the prosecution evidence and rejected it on the

basis that it was unsupported by any evidence and did not displace the clear and consistent testimony of the complainant and other prosecution witnesses. The court further found the alleged land dispute to be an afterthought.

54. For its part, the High Court re-evaluated the entire record, including the Appellant's defence, as required of a first appellate court, and concurred with the trial court that the defence did not undermine or raise any reasonable doubt in the prosecution's case. We are satisfied that both the trial magistrate and the learned Judge carefully analyzed and evaluated the prosecution evidence in conjunction with the Appellant's defence and came to the right conclusion that the Appellant defiled the complainant.

55. The Appellant has alleged that the trial court failed to comply with Section 151 of the Criminal Procedure Code because the complainant did not testify under oath.

56. In this regard Section 19 (1) of the Oaths and Statutory Provisions Act is unequivocal. It states that:

> " where in any proceeding before any court... any child of tender years called as a witness does not, in the opinion of the Court... understand the nature of an oath, his evidence may be received, though not given on oath if, in the opinion of the Court... he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth..."

57. In the present case, all prosecution witnesses, with the exception of PW2, the complainant, testified on oath. According to the record, the trial court conducted a voire dire examination to assess whether PW2, who was 8 years old, understood the nature and meaning of taking an oath. However, the trial court was not satisfied that the complainant appreciated the nature of an oath and accordingly directed that her evidence be received unsworn. The trial court having satisfied the requirements of Section 19 (1) of the Oaths and Statutory Provisions Act, this ground fails.

58. Turning now to whether the Appellant was afforded the opportunity to cross examine the prosecution witnesses. Section 302 of the Criminal Procedure Code is concerned with proceedings before the High Court, and not the trial magistrates court as was the case here. The applicable provision was Section 208 (1) and (2) of the Criminal Procedure Code, which governs trials before subordinate courts. The record demonstrates that these provisions were fully complied with, as the Appellant was accorded a full and fair opportunity to cross-examine all prosecution witnesses. Accordingly, no prejudice was occasioned to him. This ground is without merit and also fails.

59. Having reevaluated the evidence in its totality, we are satisfied that the trial court and the High Court properly analysed the evidence and rightly concluded that the elements of the offence of defilement, that is the age of the complainant, penetration and that the person identified as the perpetrator was the Appellant were proved by prosecution to the required standard. As a consequence, we have no basis on which to disturb the concurrent findings of fact of the two courts below, with the result that we uphold the Appellant's conviction.

60. Finally, as regards the issue of sentence, Section 8(2) of the Sexual Offence Act, specifies that a person found guilty for the offence of defilement against a child below 11 years of age is liable to be sentenced to life imprisonment. The Supreme Court in Republic vs. Mwangi; Initiative for

61. Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (2024) KESC 34 (KLR), affirmed the minimum mandatory statutory sentences under the *Sexual Offences Act*. What this implies is that the Appellant was liable to a minimum mandatory sentence of life imprisonment given that the

complainant was only 8 years old. Since the Appellant was sentenced as by law prescribed, we have no basis upon which to interfere with the sentence.

62. In sum, the appeal is without merit and is dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MARCH, 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb.

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR