KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Mwamba v Republic (Criminal Appeal 50 of 2019) [2026] KECA 515 (KLR) (13 March 2026) (Judgment)

Neutral citation: [2026] KECA 515 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 50 OF 2019

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

MARCH 13, 2026

BETWEEN

LUKA MUTHURI MWAMBA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Meru (D.S. Majanja, J.) dated 5th June, 2018 in Criminal Appeal No. 156 of 2017)

JUDGMENT

1. The appellant, Luka Muthuri Mwamba, preferred this second appeal against the decision of the High Court which upheld his conviction and sentence for the offence of defilement contrary to Section 8(1) as read with section8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 4th January, 2016, at around 1200 hours, at [Particulars Withheld], Kingogone Location, in Imenti South District, within Meru County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of R. F. M., a child aged 11 years.

2. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The appellant was, on the same date and place, alleged to have intentionally touched the vagina of R. F. M., a child aged 11 years, with his penis.

3. The brief facts of the case according to the prosecution were as follows:

> The complainant, in her sworn statement, told the court that the appellant was employed by her grandfather as a shamba boy, and that her parents together with her lived near her grandfather's home. She stated that on 4th January, 2016, she was at her grandfather's house watching television when her grandfather sent her home to pick her books. On her way back, the appellant called her to his house on the pretext that he wanted to send her on an errand.

It was her evidence that when she entered his house, the appellant took her to his bedroom. He undressed her, placed her on his bed, took off his clothes and lay on top her. He inserted his penis in her vagina. She stated that she tried to scream but the appellant placed his hand on her mouth. Her brother then entered the appellant's house. He was looking for her. He found the appellant on top of her. He informed her that she was being called and walked away. The complainant stated that she left the appellant's house. Her brother informed her mother (PW4) that she found the complainant at the appellant's house. The complainant explained to her mother what the appellant did to her. They reported the matter to the police. She recalled that the appellant had on earlier occasions sexually assaulted her, and that this was the third time he had defiled her. She stated that she did not report the earlier incidents as the appellant had threatened to kill her.

4. The complainant's brother, NM, testified as PW3.

   He told the court that on the material date, he went looking for the complainant as she was in possession of the keys to their shop. When he could not find her at their house, he went to the appellant's house. He found her books on a table. He went to the appellant's bedroom where he found both of them half naked on the bed. He stated that they were having sex. He walked away. When his mother, Mary Kanyamu Muriungi (PW4), came home that evening, he asked her to ask the complainant what he found her doing. PW4 confronted the complainant. She told her what had happened. PW4 also confronted the appellant who denied sexually assaulting the complainant. PW3 and PW4 stated that members of the public escorted the appellant to the police station where they reported the incident. PW4 told the court that the complainant was born on 9th May, 2004.

5. PW1, Sabrina Kaimetheri, a clinical officer at Kanyakine District Hospital, produced the complainant's P3 form. She testified that the complainant was seen at the said hospital on 4th January, 2016, alleging to have been defiled for the third time by the appellant. Upon genital examination, PW3 found that her vagina was reddened and her hymen was missing. She formed the opinion that penetration had occurred.

6. The investigating officer, PC Fanuel Mahindu (PW5), testified that he took over the case from PC Edwin Mangau, who had recorded witnesses' statements. He stated that he was present at the police station when the complainant's mother came and reported that her son had walked in on the appellant defiling her daughter. He stated that he escorted the appellant and the complainant to Kanyakine Hospital where the complainant was issued with a P3 form.

7. The appellant gave a sworn statement and called one witness.

   In his testimony, the appellant told the court that he was unwell on the material date, and that he reported to work at about 1.00 p.m. That evening, PW4 called him and asked him to go to her shop. When he got there, a mob of people attacked him, accusing him of defiling a child. They took him to the police station. The appellant denied committing the offence.

8. The appellant availed DW2, Alvina Kinanu, as a witness. She informed the court that the complainant's mother (PW4) had informed her that the appellant was slandering her name. She was planning to implicate him in a defilement case. She later learnt that the appellant had been arrested and charged. It was her evidence that PW4 used to be her business partner but that they were no longer on good terms.

9. The trial court found that the prosecution had sufficiently established its case against the appellant to the required standard of proof beyond any reasonable doubt, with respect to the main charge of defilement. The appellant was convicted and sentenced to serve life imprisonment.

10. Dissatisfied with this verdict, the appellant lodged an appeal before the High Court against his conviction and sentence. In a nutshell, the appellant challenged the decision of the trial court on grounds that: the charge as drafted was defective; the prosecution failed to prove their case to the required standard; the medical evidence was inconclusive; the prosecution's evidence was inconsistent; the prosecution witnesses lacked credibility; and that the trial magistrate failed to consider the appellant's defence.

11. The first appellate court (Majanja J.), after re-evaluating the record of the trial court and the evidence tendered before it, affirmed the conviction and sentence of the appellant by the trial court. The learned Judge determined that the complainant's evidence on penetration was corroborated by the medical evidence as well as the evidence of PW3, and that her age was sufficiently established by the birth certificate produced in evidence. On identification, the learned Judge found that the appellant was well known to the complainant, as well as PW3, and that the incident occurred in broad daylight, hence there was no chance of mistaken identity. The learned Judge dismissed the appellant's defence as an afterthought, and found that the life sentence imposed by the trial court was a mandatory sentence.

12. The appellant is now before this Court seeking to overturn the decision of the High Court on the basis of five (5) grounds of appeal. In a summary, the appellant was aggrieved that the learned Judge failed to find that the elements of the offence of defilement were not established by the prosecution to the required standard beyond any reasonable doubt. He faulted the learned Judge for failing to find that the prosecution witnesses were not credible, and that their evidence could not sustain a conviction. Lastly, the appellant was aggrieved that his conviction was based on the sole evidence of the complainant, and that the trial court failed to give reasons as to why it believed the complainant was a truthful witness.

13. The appeal was canvassed by way of written submissions of both the appellant and respondent. The appellant appeared in person. In his written submissions, the appellant appeared to have abandoned his appeal on conviction, and submitted that his appeal was only against his sentence. It was his submission that the evidence on record was that the complainant was 11 years and 8 months old at the time the offence was alleged to have been committed. He urged us to review the life sentence meted on him by virtue of section 8(2) of the *Sexual Offences Act*, since the said section prescribes a penalty in cases where the victim is aged 11 years and below. He cited section 66(1) of the *Interpretation and General Provisions Act*, as well as section 26 of the Penal Code, and argued that the court is authorized to impose or pass a sentence of a shorter term than the maximum sentence provided by the law. He was of the view that the indefinite life sentence imposed upon him was harsh and excessive in the circumstances of this case.

14. Regarding the sentence, learned prosecution counsel, Ms. Nandwa, submitted that the sentence meted upon the appellant was not excessive and was well within the law. She maintained that the two courts below took into account the trauma occasioned upon the complainant, and the fact that the appellant defiled the complainant on three separate occasions, and threatened to kill her if she disclosed the incident. She reiterated that the court is bound by the law which provide for mandatory minimum sentences. In the premises, she invited us to dismiss the appeal for lack of merit.

15. Being a second appeal, our mandate is limited by Section 361(1) (a) of the Criminal Procedure Code to consider issues of law only, but not matters of fact that have been tried by the first court and re-evaluated on first appeal and concurrent findings arrived at, unless it is demonstrated that the two courts below considered matters they ought not to have considered, or that they failed to consider matters they should have considered, or that looking at the evidence as a whole they were plainly wrong in their decision. See Kaingo v. Republic [1982] KLR 213.

16. We have carefully considered the record of appeal, the submissions by both parties, and the law.

17. As stated earlier in this Judgment, although the appellant filed this second appeal challenging both conviction and sentence, at plenary hearing of the appeal, the appellant abandoned his appeal against conviction. He argued his appeal on sentence only.

18. The thrust of the appellant's appeal is the interpretation of section 8(2) of the *Sexual Offences Act*. It is the appellant's submission that he ought to have been sentenced under section 8(3) of the *Sexual Offences Act* as the victim was aged 11 years and 9 months at the time the offence was committed. According to the evidence adduced by the mother of the victim, the victim was born on 9th May, 2004. The appellant was convicted of defiling the victim on 4th January 2016. The charge sheet stated that the victim was at the time a child aged 11 years.

19. The appellant argued that since the victim was aged more than 11 years at the time the offence was committed, he ought to be sentenced to serve the term prescribed under section 8(3) of the *Sexual Offences Act*. The Prosecution does not buy this argument. They insist that the sentence that was meted on the appellant was legal and ought not to be disturbed by this Court on second appeal.

20. Section 361(1) of the Criminal Procedure Code prohibits this Court from considering appeals on sentence on second appeal. Section 361(1)(a) of the said Act specifically provides that sentences being a matter of fact is not subject to appeal to this Court on second appeal. There are exceptions to this rule. In Benard Kimani Gicheru V Republic [2002] eKLR, this Court held as follow:

> " It is now settled law, following several authorities by this Court and the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence, unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial courts on sentence unless, anyone of the matters already stated is shown to exist."

21. Section 8(2) of the *Sexual Offences Act* provides thus:

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to life imprisonment.

Section 8(3) of the *Sexual Offences Act* states that:

> " 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."

22. The appellant has raised a novel argument to the effect that this Court should interpret that section 8(2) of the *Sexual Offences Act* does not apply to him because the victim was, at the time the offence was committed, aged 11 years and 9 months. In actual fact the victim was 11 years and 8 months at the time the offence was committed. We note that this issue was not raised before the trial court and the first appellate court by the appellant. It is being raised for the first time on this second appeal. This Court has stated time and time again that it lacks jurisdiction to consider an issue that is being raised for the first time on second appeal. The reason for this is clear: This Court can only render a decision

based on an opinion that has been rendered by the court from which the appeal emanates from (see Wamalwa V Republic [2024] KECA 742 (KLR).

23. We are not persuaded by the argument advanced by the appellant that the victim was aged more than 11 years at the time she was defiled. The fact that the victim had not reached her twelfth birthday means that she was still 11 years at the time the offence was committed. The appellant was convicted under the correct penal section of the *Sexual Offences Act*.

24. The appeal lacks merit and is hereby dismissed.

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

JAMILA MOHAMMED

....

JUDGE OF APPEAL

L. KIMARU

....

JUDGE OF APPEAL

A.O. MUCHELULE

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR