

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CRIMINAL APPEAL NO E024 OF 2024

LABAN MUNALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon R. M. Ndombi (SRM) delivered at Vihiga in the Principal Magistrate's Court in Sexual Offence Case No 76 of 2020 on 26th October 2021)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged 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. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.
2. The Learned Trial Magistrate, Hon R. M. Ndombi (SRM) convicted him of the main charge and sentenced him to fifteen (15) years imprisonment.
3. Being dissatisfied with the said Judgement, on 30th May 2024, he lodged an appeal herein. His Petition of Appeal was dated 24th May 2024. He set out four (4) grounds of appeal.
4. He filed two (2) sets of submissions. Both were undated. The first one was filed on 28th March 2025 and the second one was filed on 9th June 2025. The Respondent's Written Submissions were dated 16th June 2025 and filed on 18th June 2025. The Judgment herein is

based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Charge Sheet was defective;**
 - b. Whether or not the Prosecution proved its case beyond reasonable doubt; and**
 - c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.**

8. Although in his Written Submissions that he filed on 9th June 2025 the Appellant indicated that the Appeal herein was on sentence only and not conviction, this court nonetheless dealt with the aforesaid issues under the following distinct and separate heads as he had challenged the evidence that the Prosecution witnesses tendered in court.

I. CHARGE SHEET

9. Although the Appellant did not raise any ground of appeal regarding the Charge Sheet, this court found it prudent to address the issue as he had submitted on the same. He asserted that he ought to have been charged with the offence of incest and not defilement as PW 1 was his relative and neighbour. He referred the court to the cases of **Stephen Odhiambo Agutu vs Republic Criminal Appeal No 128 of 2016** and **Keneri Opiyo Gilo vs Republic Petition No 45 of 2020** (both eKLR citation not given) without highlighting the holding that he was relying upon. The Respondent did not submit on this issue.

10. Notably, Section 134 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

“Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

11. In addition, it was held in **Sigilani vs Republic (2004) 2 KLR**, that the principle of the law governing charge sheets was that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.
12. Applying the test above and upon keenly perusing the charge sheet, this court found that the particulars of the offence of defilement were clearly spelt out, and these included the section of the law creating the offence, the date of the offence, the place of the offence, the act constituting the offence and the name and age of the victim.
13. The Appellant did not raise any objection before the Trial Court or any contention that the Charge Sheet was defective. He fully participated in the trial in clear demonstration that he understood the charge. He cross-examined the witnesses and was able to put an appropriate defence. This was sufficient indication that he understood the particulars of the charge he faced. The offence was disclosed and stated in a clear and unambiguous manner, there was no allegation that because of the way that the Charge Sheet was drafted or framed, he was unable to plead to a specific charge that he could not understand or that he was unable to prepare his defence. In the circumstances, the Appellant could not be said to have been prejudiced.

14. Even assuming that there was some defect or omission in the Charge Sheet, the same was still curable under Section 382 of the Criminal Procedure Code which provides as follows:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

15. In any event, the Appellant who admitted that he was PW 1's cousin did not suffer any prejudice on account of the offence he was charged with because the sentence for the offence of incest, where the victim was below eighteen (18) years, was life imprisonment.

16. Section 20(1) of the Sexual Offences Act which provided as follows:-

“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge, his daughter, granddaughter, sister, mother,

niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.

Provided that, if it is alleged in the information or charge and provided that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

17. On the other hand, Section 8(3) of the Sexual Offences Act Cap 63A (Laws of Kenya) stipulates 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.”

18. Article 157 (10) of the Constitution of Kenya, 2010 was clear that the Director of Public Prosecution (DPP) could not be directed how to charge. The said provision provided that the DPP was required to exercise his powers independently and not under the direction or control of any person or authority.

19. In view of its prosecutorial powers, the DPP could not be faulted for choosing whichever provision of the law it found would best dispense justice for a child who was aged fifteen (15) years at the time of the offence.

20. In the premises foregoing, this court found and held that the Appellant's assertion was not merited and the same be and is hereby dismissed.

II. PROOF OF PROSECUTION'S CASE

21. Ground of Appeal No (1), (2), (3) and (4) of the Petition of Appeal were dealt with under this head.

22. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

23. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of **George Opondo Olunga vs Republic [2016] eKLR**. This court dealt with the same under the following distinct and separate heads.

A. AGE

24. The Appellant did not submit on the issue of age. On the other hand, the Respondent placed reliance on the case of **Charles Wamukoya Karani vs Republic Criminal Appeal No 72 of 2013** (eKLR citation not given) where it was held that the critical ingredients forming the offence of defilement were age of the complainant, proof of penetration and positive identification of the assailant.

25. It submitted that the Charge Sheet indicated that the Complainant, AM (hereinafter referred to as “PW 1”) was fifteen (15) years of age at the time of the commission of the offence. It relied on the case of **Musyoki Mwakavi vs Republic[2014]eKLR** where it was held that in a charge of defilement, age of the minor could be proved by medical evidence, baptism card, school leaving certificates, by the victim’s parents and/or guardians, observation or common sense.
26. It pointed out that No 93562 P.C.W Judith Atieno (hereinafter referred to as “PW 6”) testified and produced PW 1’s Birth Certificate which indicated that she was born on 9th August 2005 and, therefore, fifteen (15) years old at the time of the commission of the offence.
27. Notably, PW 6 produced the said Birth Certificate as evidence in this case. A perusal of the same showed PW 1 was born on 9th August 2005. The incident took place on 7th December 2020. This meant that she was about fifteen (15) years old at the material time of the incident.
28. As the Appellant did not challenge the production of the aforesaid Birth Certificate and/or rebut the said evidence by adducing evidence to the contrary, this court was satisfied that PW 1’s age was proven beyond reasonable doubt and that she was a child at all material times.

B. IDENTIFICATION

29. The Appellant did not submit on this issue. On its part, the Respondent averred that PW 1 testified that it was the Appellant who defiled her and that they were neighbors and the incident happened during daytime. It argued that, therefore, he was well known to her and she could not have been mistaken as to his identity.
30. It submitted that that was the evidence of recognition which was held by courts to be more reliable and weightier than that of identification of a stranger as was held in the case of **Anjononi & Others vs Republic (1976-80) 1 KLR 1566, 1568.**
31. It further asserted that Martha Amimo (hereinafter referred to as "PW 2") and Martin Ndengu Ekhubi (hereinafter referred to as "PW 3") also testified that they rushed to the scene after hearing screams and saw PW 1 leaving the house of the Appellant while placing her hands between her thighs. It added that they further stated that they questioned her and she informed them that the Appellant had raped her. It pointed out that they added that the Appellant emerged with a panga and threatened them saying that PW 1 was framing him.
32. A perusal of the proceedings showed that PW 1 gave an unsworn statement. She testified that on 7th December 2020, she went to play with other children being Anindo, Davy and Wembo in the playing field at Anindo's place. She said that after playing football, they went to play hide and seek game and when it came to her turn, she saw someone seated beside her.

33. It was her further testimony that she knew the person as Laban, the Appellant herein. She asked him what he was doing beside her and the Appellant did not respond. She said that she stood up but the Appellant made her seat. She also wanted to scream but the Appellant threatened to cut him with a panga which he had gotten from the room he sleeps.
34. She further testified that the Appellant got hold of her by force and took her to his room, removed her pant, removed his pair of trouser, took a white thing placed on his thing that he uses to urinate and entered her hole that she used to urinate. She said that she felt pain and almost bled. She further stated that she wanted to scream but the Appellant held a panga on his hand and then went behind the house. She also went outside crying and one mother to Anindo who was washing utensils outside asked her why she was crying and she told her that she had been raped by Laban. Anindo's mother told her to go and call her mother. She told the Trial Court that PW 1 was taken to Coptic Hospital.
35. PW 2 and PW 3 also testified that they rushed to the scene after hearing screams and saw PW 1 leaving the Appellant's house while placing her hands between her thighs. They further stated that they questioned her and she informed them that the Appellant had raped her. They added that the Appellant emerged with a panga and threatened them saying that PW 1 was framing him.
36. PW 1's mother, Betty Naftali Setikho (hereinafter referred to as "PW 4"), testified that on the material day of 7th December 2020

at 10.40a.m she was washing utensils when she heard PW 1 crying loud and in pain. She stated that PW 1 came to her and said, “Mama Labo ameni rape” (ameninajisi) (Mama Labo has raped me).

37. It was her testimony that she went to the Appellant’s home as PW 1 followed her from behind. They found a crowd and the Appellant was standing in their homestead with a panga and speaking in anger saying people were lying about him raping PW 1.

38. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the Evidence Act Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

39. Notably, the proviso of Section 124 of the Evidence Act states that:-

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged

victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis).”

40. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person’s word against the other. Other corroborating evidence such as proof of penetration could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. This was even more critical where the complainant had adduced unsworn evidence.

41. PW 1 positively identified the Appellant as the perpetrator of the offence. She was emphatic that it was him who defiled her. She knew him well as he was his cousin and they were neighbors. She identified him by his name, Laban. There could not, therefore, have been any possibility of a mistaken identity of the Appellant.

42. However, as she gave unsworn evidence, this court fell back on the evidence of PW 2 and PW 3 who were direct witnesses who saw PW 1 leaving the Appellant’s house holding her two (2) hands between her thighs. They also saw the Appellant coming out of his house brandishing a panga threatening to cut the people who had gathered outside his house.

43. The P3 Form indicated that the incident occurred at 10.30 am when the lighting conditions were favourable for positive

identification of the Appellant herein. The Appellant was also PW 2's nephew and a neighbour to relative to PW 4. Identification was by way of recognition and there could not have been any mistaken identity.

44. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

C. PENETRATION

45. The Appellant did not submit on this issue. On its part, the Respondent cited Section 2 of the Sexual Offences Act and placed reliance on the case of **Mohammed Omar Mohammed vs Republic[2020]eKLR** where it was held that the key evidence relied upon by the courts in rape and defilement cases in order to prove penetration was the complainant's own testimony which was usually corroborated by the medical report presented by the medical officer. It submitted that the evidence of PW 1, PW 2, PW 3 and the Clinical Officer, Janetrix Isaya (hereinafter referred to as "PW 5") showed that penetration had been proved beyond reasonable doubt.

46. Notably, PW 5 testified that on examining PW 1, she found that her panty had blood stains, she had vaginal discharge which was reddish and with odour, she had laceration on inner vaginal wall and her hymen was broken. She opined that the examination revealed that the cervical was defiled by forced penetration. She

produced the P3 Form and Post Rape Care (PRC) Form as exhibits during trial.

47. In his defence, the Appellant denied the charges and stated that on the material day of 7th December 2020, he was at the shop and when he returned home he found people talking saying that PW 1 had been defiled and that he was the one that had defiled her. He said that PW 1 was her cousin and that he could not do such thing to her. However, he was later arrested.

48. Notably, PW 1's evidence was corroborated by the scientific evidence of PW 5. The Appellant's defence was simply a denial. His evidence was not watertight enough to have displaced the Prosecution's inference of guilt on his part.

49. In the premises foregoing, this court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 on the material date as there was proof of defilement as PW 5 testified.

50. In the premises foregoing, Ground of Appeal No (1), (2), (3) and (4) of the Petition of Appeal were therefore not merited and the same be and are hereby dismissed.

I. SENTENCE

51. The Appellant relied on Section 26(2) of the Penal Code and Article 50(2)(p) of the Constitution of Kenya and pleaded with the court to reduce his sentence to a least form of punishment. He asserted that he was transformed, reformed and well rehabilitated.

He argued that failing to reduce the sentence would go against the objectives of penitentiary institutions by turning our correctional facilities into detention camps. In this regard, he relied on the case of **Francis Karioko Muruatetu & Another vs Republic Petition No 15 of 2015** (eKLR citation not given) where the objectives of sentencing were identified as retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation.

52. He asserted that with the passage of time it became a poor guarantee of a just and proportionate sentence if not reviewed, and that if the sentence was not reduced, the same would not serve the interests of justice or those of the society. He urged the court to enroll him to a Probation/Community Service Order.

53. He was categorical that he was arrested while he was a young man hence his dreams were ruined by the long incarceration. He was emphatic that his sentence was excessive, arbitrary, harsh and demining depending on the circumstances surrounding the nature of his offence. He added that he had maintained high standard of discipline amongst the staff officers and fellow inmates. He pointed out that he was a first offender and remorseful. He urged the court to impose on him a non-custodial sentence in line with the case of **Samson Boyi Nkulet vs Republic[2019]eKLR.**

54. On its part, the Respondent submitted that the Trial Court considered the Appellant's mitigation and the Pre-sentence Report, hence the sentence was safe and proper and should be upheld.

55. The Appellant herein was sentenced under Section 8(3) of the Sexual Offences Act Cap 63 A (Laws of Kenya). The same provides as follows: -

“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”

56. This court could, however, not fault the Trial Court for having sentenced the Appellant to fifteen (15) years imprisonment because at the time, the jurisprudence allowed courts to exercise discretion in reducing mandatory minimum sentences.

57. Notably, in the case of **Joshua Gichuki Mwangi vs Republic [2022] eKLR**, the Court of Appeal reiterated the reasoning in the case of **Dismas Wafula Kilwake vs Republic [2018] eKLR** where it held that Section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

58. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case **Joshua Gichuki Mwangi vs Republic** (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme

Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.

59. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Appellant's sentence. It had no option but to leave the said sentence that was meted against the Appellant herein undisturbed.

60. This court was not persuaded to enhance the sentence to twenty (20) years, as it did not put the Appellant on notice that it would be seeking an enhancement of the sentence which would have allowed him to make an informed decision as to whether he would have wished to proceed with his application or if he would have wished to abandon the same. Enhancing his sentence without giving him the opportunity to respond would be contrary to the principles of fair trial provided in Article 50 of the Constitution of Kenya.

61. Going further, this court was mandated to consider the period he spent in remand while his trial was on going as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

62. Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides that:-

“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on

which it was pronounced, except where otherwise provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”

(emphasis court).

63. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:-

“The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:...

Time already spent in prison by the convict...”

64. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR**.

65. A perusal of the Charge Sheet indicated that the Appellant was arrested on 8th December 2020. Although he was granted bail, he did not appear to have gone out on bond. He was sentenced on 23rd February 2022. A perusal of the Trial Court proceedings showed that the court did not take into account the period he spent in custody during trial while sentencing him. It was this court’s view that that was a period that ought to have been taken into account in line with Section 333(2) of the Criminal Procedure Code.

DISPOSITION

66. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 24th May 2024 and filed on 30th May 2024 was not merited and the same be and is hereby dismissed. His conviction and sentence be and are hereby upheld as they were both safe.

67. However, for the avoidance of doubt, the period that the Appellant spent in custody between 8th December 2020 and 22nd February 2022 be and is hereby taken into account in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) while computing his sentence.

68. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **24th** day of **March** 2026

J. KAMAU
JUDGE