REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CRIMINAL APPEAL NO E039 OF 2024

WILLBORN MUKALUSHI……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an Appeal from the Judgment of Hon M. Ochieng (SPM) delivered at Hamisi in the Senior Principal Magistrate's Court in Sexual Offences Case No 49 of 2022 on 6th October 2023)

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 M. Ochieng (SPM) convicted him of the main charge and sentenced him to twenty (20) years imprisonment.
3. Being dissatisfied with the said Judgement, on 29th November 2024, the Appellant lodged an appeal herein. His Petition of Appeal was dated 27th November 2024. He set out five (5) grounds of appeal. On 30th July 2025, he filed Amended Grounds of Appeal dated 25th July 2025. He set out five (5) Amended Grounds of Appeal.
4. His Written Submissions were dated 25th July 2025 and filed on 30th July 2025 while those of the Respondent were dated 5th September 2025 and filed on 10th September 2025. The Judgment herein is

ORIGINAL FILE COPY

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 Amended 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 Trial Court conducted a *voir dire* examination and if not, if the same rendered the trial a nullity;**
    b. **Whether or not the Prosecution proved its case beyond reasonable doubt; and**

ORIGINAL FILE COPY

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. The court therefore dealt with the said issues under the following distinct and separate heads.

I. ***VOIR DIRE* EXAMINATION**

9. Amended Ground of Appeal No (2) was dealt with under this head.

10. On his part, the Appellant herein argued that the Trial Court erred in law and fact in not having conducted a *voir dire* examination. He placed reliance on the case of **Marippet Loonkomok vs Republic [2016] eKLR** where it was held that *voir dire* examination on children of tender years had to be conducted and that failure to do so did not in *per se* vitiate the entire prosecution case but that evidence that was not taken under oath could not be used to convict an accused.

11. On its part, the Respondent cited Section 125(1) of the Evidence Act and submitted that the purpose of *voir dire* was to ensure that the minor understood the solemnity of oath and if not at the very least the importance of telling the truth as was held by the court in **Johnson Muiruri vs Republic[1983]KLR 445.**

12. It asserted that EK (hereinafter referred to as “PW 1”) was aged fourteen (14) years at the time of the commission of the offence and fifteen (15) years at the time that she testified in court

ORIGINAL FILE COPY

and she was, therefore, not a child of tender years. It was categorical that the Trial Court did not need to conduct a *voir dire* examination as the witness was not of tender years.

13. Section 19 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) stipulates as follows:-

"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."

14. In addressing what age would be appropriate for a trial court to conduct a *voir dire* examination, this court had due regard to the case of **Maripett Loonkomok vs Republic (Supra)** where the Court of Appeal found and held that children under the age of fourteen (14) years ought to be taken through a *voir dire* examination. It rendered itself as follows:-

ORIGINAL FILE COPY

"…the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for *voir dire* examination. It follows from a long line of decisions that *voir dire* examination on children of tender years must be conducted and that failure to do so does not *per se* vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;

"In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction."

15. Notably, the age at which a *voir dire* examination ought to be conducted depends on the circumstances of a particular case and was not cast on stone. Indeed, a court was obligated to enquire into the mental incapacity of a child irrespective of his or her age with a view to conducting a *voir dire* examination to determine if he or she should adduce sworn or unsworn evidence. Indeed, a child could be

aged seventeen (17) years but have the mental capacity of a two (2) year old child due to many health complications.

16. The ascertainment of whether such a witness understood the meaning of taking an oath could not therefore be taken lightly as an accused person could be convicted on the basis of sworn evidence of such a witness.

17. Bearing in mind the holding in the case of **Maripett Loonkomok vs Republic (Supra)**, this court found and held that the Trial Court could not, therefore, have been faulted for having not conducted a *voir dire* examination for the reason that according to the Dedication Card in respect of PW 1, she was born on 14th January 2008. The incident happen on diverse dates between 4th and 20th September 2022 which put her age at fourteen (14) years at the material time.

18. In the premises foregoing, Supplementary Ground of Appeal No (2) was therefore not merited and the same be and is hereby dismissed.

ORIGINAL

II. PROOF OF PROSECUTION'S CASE

19. Amended Ground of Appeal No (3), (4) and (5) were dealt with under this head.

20. 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.

21. 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

22. The Appellant did not submit on the issue of age. On the other hand, the Respondent submitted that the Charge Sheet indicated that PW 1 was fourteen (14) 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.

23. It pointed out that Befry Ingado (hereinafter referred to as "PW 2") testified that PW 1 was a minor born on 14th January 2008. It added that No 92118 Corporal Lucy Chanzu (hereinafter referred to as "PW 5") testified that PW 1 was fourteen (14) years old at the time of the commission of the offence and produced her Dedication Card as exhibit which showed that she was born on 14th January 2008 and was, therefore, a minor. It was emphatic that age had been proved satisfactorily.

ORIGINAL FILE COPY

24. This court had due regard to the case of **Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010** (unreported) where the Court of Appeal stated that the age of a minor in a charge of defilement could be proved by medical evidence and documents such as baptism cards, school leaving certificates. It can also be proved by the victim's parents or guardian and observation or common sense as was held in the case of **Musyoki Mwakavi vs Republic [2014] eKLR**.

25. Notably, PW 5 produced the said Dedication Card as evidence in this case. A perusal of the same showed PW 1 was born on 14th January 2008. The incident took place on diverse dates between 4th and 20th September 2022. This meant that she was about fourteen (14) years old at the material time of the incident.

26. As the Appellant did not challenge the production of the aforesaid Dedication Card 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

27. The Appellant did not submit on this issue. On its part, the Respondent averred that PW 1 testified that she knew the Appellant as a friend and stayed with him at his house for a week. It argued that there was, therefore, no contention that he was well known to her and she could not have been mistaken as to his identity. It was

ORIGINAL FILE COPY

emphatic that there was proper identification as there was prior knowledge of the Appellant.

28. It submitted that the identification was by recognition which courts held to be more reliable and weightier than identification of a stranger as was held in the case of **Anjononi & Others vs Republic (1976-80) 1 KLR 1566, 1568**.

29. A perusal of the proceedings showed that PW 1 testified that on 4th September 2022, she left school but did not find her grandmother at home. She said that she went to the Appellant's house as she knew him as a friend. She stated that she stayed in his house and they had sex. PW 2 stated that she found PW 1 with the Appellant.

30. 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.

31. 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

ORIGINAL FILE COPY

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)**."**

32. 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.

33. 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 a friend. There could not, therefore, have been any possibility of a mistaken identity of the Appellant. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

C. PENETRATION

34. The Appellant faulted the Trial Court for failing to observe the circumstances in which the offence was committed. He invoked Section 33 of the Sexual Offences Act and placed reliance on the

ORIGINAL FILE COPY

case of **Absalom Okila Ombaka vs Republic[2020]eKLR** where it was held that the circumstances under which an offence was alleged to have been committed could not be ignored.

35. He questioned why PW 1 moved to his house and submitted that PW 1's behavior was that of an adult and not a child. He asserted that children were not meant to enjoy sexual intercourse but that whenever they did, then that became the behaviour of an adult. He argued that it was unfair to sentence someone to long incarceration when the complainant was enjoying the relationship.

36. He further relied on the case of **Gillicks vs West Norfolk & Wis Beach Area Health Authority (1985) 3 ACK ER 402** where it was held that it was unrealistic to assume that teenagers and maturing adults did not often seek sexual activity with their eyes fully open. He was categorical that he fell within the defence under Section 8(5) of the Sexual Offences Act.

37. He further relied on Section 2 of the Sexual Offences Act and submitted that PW 1's and PW 4's evidence did not prove penetration. To buttress his point, he relied on the case of **Arthur Mshila Manga** (eKLR citation not given) where the medical record therein did not establish defilement. He added that the prosecution had to make necessary all available witnesses necessary to establish the truth even if the evidence may be inconsistent.

38. 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

ORIGINAL FILE COPY

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.

39. It submitted that the evidence of the Clinical Officer, Douglas Obare (hereinafter referred to as "PW 4") corroborated that of PW 1 and that penetration was, therefore, proved.

40. It further submitted that no particular number of witnesses was required to prove a fact. It referred to Section 143 of the Evidence Act and relied on the case of **Keter vs Republic(2007) EA 135** where it was held that the prosecution was not obliged to call a superfluity of witnesses but only such witnesses as were sufficient to establish the charge beyond any reasonable doubt. It was emphatic that in this case, it called key and crucial witnesses to support the case.

41. In his evidence, PW 4 confirmed that on examining PW 1, he observed that she had whitish discharge in her private parts. He stated that PW 1 told him that she had had sexual intercourse with different persons. He produced the P3 Form, Post Rape Care (PRC) Form and treatment notes as evidence in this case.

42. In his defence, the Appellant denied the charges and stated that on the diverse material dates, he was away at work at Mudungu village.

43. Notably, PW 1's evidence was corroborated by the scientific evidence of PW 4. In ascertaining whether the Appellant's defence

ORIGINAL FILE COPY

of alibi had value, this court had due regard to the definition of "alibi" in the **Black's Law Dictionary, 10th Edition.** It was defined as:-

"A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time".

44. It was also trite law that once a respondent raised an alibi defence, the onus shifted to the prosecution to displace the same as was held by the Court of Appeal in the case of **Victor Mwendwa Mulinge vs Republic [2014] eKLR.**

45. In this case, the defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides that:-

"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

46. Be that as it may, weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Appellant's alibi evidence to have been watertight enough to have weakened the inference of guilt on his part. This is because the Prosecution had demonstrated the elements of the offence of

robbery with violence as was set out in the case of **George Opondo Olunga vs Republic**(Supra).

47. The witnesses who were called by Prosecution adduced sufficient evidence to establish the charge.

48. 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 diverse dates as there was proof of defilement as PW 4 testified.

49. In the premises foregoing, Amended Grounds of Appeal No (3), (4) and (5) were, therefore, not merited and the same be and are hereby dismissed.

I. SENTENCE

50. Amended Ground of Appeal No (1) was dealt with under this head.

51. The Appellant placed reliance on the cases of **88 Prisoners vs DPP, AG and the Prison Home Made Petition** (eKLR citation not given) where it was held that the sentence is deemed to start when liberty was lost and **Paul Omondi Odipo & 4 Others vs Republic Miscellaneous Application No E049 of 2021** (eKLR citation not given) where it was held that while applying Section 333(2) of the Criminal Procedure Code alongside its provisions, the sentence of imprisonment ought to run from the date of arrest.

ORIGINAL FILE COPY

52. He submitted that he was arrested on 21st September 2022 and convicted and sentenced on 10th November 2023 but his sentence was said to run from the date of its pronouncement. He added that he was not released on bail/bond pending trial hence his sentence ought to run from the time he lost his liberty rather than from his conviction.

53. On its part, the Respondent invoked Section 8(3) of the Sexual Offences Act and placed reliance on the case of **Supreme Court Petition No E018 of 2023 Republic vs Joshua Gichuki Mwangi** (eKLR citation not given) where it was held that although sentencing was an exercise of judicial discretion, it was parliament and not judiciary that set the parameters of sentencing for each crime.

54. It also relied on the case of **Shadrack Kipchoge Kogo vs Republic Criminal Appeal No 253 of 2003** (eKLR citation not given) where it was held that sentencing was an exercise of the trial court and for an appellate court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.

55. It further invoked Section 329 of the Criminal Procedure Code and noted that the Trial Court took into account the evidence, the nature of the offence and the circumstances of the case in arriving at the appropriate sentence. It asserted that the sentence was safe and proper and should be upheld. It did not oppose the Appellant's

ORIGINAL FILE COPY

prayer under Section 333(2) of the Criminal Procedure Code. It relied on the case of **Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR** where it was held that courts must take into account the time spent in custody during trial while sentencing accused persons.

56. 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"

57. This court could not therefore fault the Trial Court for having sentenced him to twenty (20) years imprisonment as that was lawful.

58. 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.

ORIGINAL FILE COPY

59. 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.

60. 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.

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

ORIGINAL FILE COPY

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**(Supra).

65. A perusal of the Charge Sheet indicated that the Appellant was arrested on 22nd December 2022. Although he was granted bail, he did not appear to have gone out on bond. He was sentenced on 10th November 2023. Although the Trial Court had noted that it took into account the period he had spent in remand, it did not include the same in the computation of the sentence.

66. The Trial Court did not demonstrate any aggravating factors to have sentenced the Appellant to more than the minimum that was prescribed under Section 8(3) of the Sexual Offences Act. In the absence of such justification, this court found and held that it was only fair that the Appellant herein enjoy the benefit of a least severe of the prescribed sentence of twenty (20) years by taking into

ORIGINAL E-COPY

account the period that he spent in custody while his trial was ongoing in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

67. Indeed, Article 50(2)(p) of the Constitution of Kenya, 2010 provides as follows:-

“Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing”

DISPOSITION

68. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Amended Grounds of Appeal dated 25th July 2025 and field on 30th July 2025 were not merited and the same be and are hereby dismissed. His conviction and sentence be and are hereby upheld as they were both safe.

69. However, for the avoidance of doubt, the period that the Appellant spent in custody between 22nd December 2022 and 9th November 2023 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.

70. It is so ordered.

ORIGINAL FILE COPY

DATED and **DELIVERED** at **VIHIGA** this **19th** day of **March** 2026

J. KAMAU
JUDGE

ORIGINAL FILE COPY