Muli v Republic (Criminal Appeal E014 of 2025) [2026] KEHC 3978 (KLR) (25 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3978 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL E014 OF 2025

BM MUSYOKI, J

MARCH 25, 2026

BETWEEN

JOHN MUTUKU MULI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from conviction and sentence in the Chief Magistrate's Court at Thika (Hon. O.M. Wanyanga SRM) in sexual offence case number E019 of 2021 dated 2-11-2023 and 14-12-2023 respectively)

JUDGMENT

1. The appellant was charged with defilement of a boy contrary to section 8(1) of the *Sexual Offences Act* particulars being that on diverse days between the month of 1st March and 16th April 2021 at Barister estate in Juja Sub County within Kiambu County willfully and intentionally caused his penis to penetrate the anus of RM a boy aged 9 years. There was also an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual offences Act* the particulars thereof being that on diverse days between 1st March and 16th April 2021 at Barister estate in Juja Sub County within Kiambu County willfully and intentionally caused his penis to come into conduct with the anus of RM a boy aged 9 years.

2. The prosecution called a total of six witnesses and after being found with a case to answer, the appellant testified by giving unsworn statement and did not call any witness. He was convicted of the main count and sentenced to life imprisonment. This appeal arises from this conviction and sentence based on six grounds as follows;

    1. That the learned trial Magistrate erred in law and fact in overlooking fairness due to a flawed trial as grave violation of the procedural, evidential and general constitutional law.

2. That the learned trial Magistrate erred in law and fact by admitting a grossly defective charge sheet contrary to Section 134 & 124(1) of the C.P.C.

3. That the learned trial Magistrate erred in both law and fact by admitting and relying on evidence of witnesses who were both hostile and incredible and therefore unreliable for admissibility.

4. That the learned trial Magistrate erred in law and fact in illegally admitting evidence contrary to exclusionary rule of Article 50(4) of *the Constitution*.

5. That trial Magistrate erred in law and fact by falling to observe and note that some of the crucial exhibits were not disclosed to the defence herein.

6. That the trial Magistrate erred in law and fact by disregarding vital features of the case, appreciating scrutiny which was not free from care and caution hence failure to consider the evidence objectively and dispassionately which gravely violated Section 107 of the *Evidence Act*.

7. That the learned trial Magistrate erred in law and fact in analysing and/or evaluating the respondent's evidence separately, forming a considered opinion or impression thereof and then laying the burden of disproving and/or dispelling the pre-mediated impression upon the appellant contrary to the established principles in criminal law which casts burden of proof upon the respondent.

8. That the trial Magistrate erred in law and fact in failing to consider and/or disregarding the appellant's defence and thus arrived at a conclusion which is contrary to law and weight of evidence on record.

9. That the life sentence meted has overridden the proportional legal tenets of punishment thus does not achieve the objectives intended in our justice system and goes against the new developments in matters law hence sentence legality.

3. I have done my best to make out the intended meaning and sense from the above grounds which are reproduced in verbatim from the petition of appeal dated 27th March 2025. In my efforts to do so, I have identified the following as the appellant's complaints against the judgment of the court;

a. The charge sheet was fatally defective.

b. The trial was marred by procedural and evidential flaws and violation of *the Constitution*.

c. The witnesses were incredible and hostile.

d. The court shifted the burden of proof to the appellant.

e. The sentence was illegal.

4. In my judgment, I will confine myself to the grounds raised above although I note that the appellant's submissions do at some areas digress from the petition of appeal. The law does not allow an appellant to go outside his grounds without leave of the court which has not been sought. This is so provided in section 350(2) of the Criminal Procedure Code which provides that;

> "'A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices

or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal."

5. In order to bring into context the grounds of appeal and the appellant's grievances and in order to comply with the principle that a first appeal should be conducted in a manner as if it were a re-hearing where the court should consider the evidence produced at the trial in the lower court and come to its own independent conclusion, I will revisit the evidence of the parties as hereinbelow.

Prosecution's case

6. The first witness was the complainant who stated that he was aged 9 years having been born on 2-08-2011 and that he was in grade three at Maadili Junior School and was at the time he was testifying, in grade 3. Before he testified, the trial court conducted a voire dire inquiry and certified that the child appeared intelligent enough to understand the meaning of an oath.

7. The child told the court that in April of 2021, he was playing with his friend, one Eman when 'Mutuku' who he knew as their watchman and who was in court held him and took him to his small house. The watchman's house was next to their house. The child added that, Mutuku gave him chicken meat which he refused and as he tried to get out, the appellant restrained him. The appellant proceeded to remove his 'susu' and the child's trouser and put his 'susu' and finger to the child's anus. The child added that he told the appellant to stop but he did not.

8. He added that, the appellant only put his finger in his anus on the first time. The child tried to go out again but the appellant grabbed him, put him back in the house, removed his 'susu' again and put it in his anus. The child felt pain and the appellant threatened to beat him if he told his mother. The child later told his father on the same day. He was taken to hospital and given medicine. The child added that, it is something the appellant had done before on a date he could not remember. The child stated further that his mother has never asked him about the incident.

9. In cross examination, he said that Eman did not see the appellant holding his hand. He added that they were playing outside the appellant's house. He remembered that he had not gone to school on that date as the schools were closed. He added that he did no tell his friend what the appellant had done. He only told his dad. He stated that the appellant only lowered his trouser. He stated that, one Joseph who was a watchman told him what to say in court. He however in re-examination stated that, Joseph did not tell him to lie to court.

10. Josphat Mwanzia Thomas the child's father was the 2nd witness. He told the court that the child was born on 2-08-2011. He added that on 18-04-2021, his wife called and informed him that the boy's underpants which he identified in court had faeces and oil. In his words, the stains were not normal. He talked to the child and when he who took him to a site they were building at Kenyatta Road, he started crying. The child told him that John Mutuku had been sodomising him severally. When he asked why he had not told him, the child told him that the appellant had threatened him.

11. The witness added that he went to the house and later, in the company of his wife to Juja police station where they reported. They were interviewed together with the child. The child was taken to Ruiru Sub County Hospital for treatment and examination. He identified treatment notes and the child's birth certificate. He added that P3 and PRC forms were filled and the appellant arrested. They later took the child to Gertrude Children's Hospital for counselling where he was diagnosed with post-traumatic stress.

12. The witness was cross examined by the counsel for the appellant where he stated that it was his wife who brought the condition of the pant to his attention. The pant had been washed but the stain was still there. The pant was not taken to the government chemist for examination although the stain was the basis of suspicion of sodomy. He added that it was him who asked the child about the sodomy on 18-04-2021 and that no one else witnessed the sodomy. He had no evidence that the residues on the pant belonged to the appellant. He added that he checked the child's anus on 18-04-2021 and found it moist which could be evidence of sodomy. In re-examination, he stated that the they started counselling sessions before he testified.

13. PW3 was one Jecinta Mutisya a teacher at Brightstar Girls Secondary School. She recalled that on 17-04-2021, she entered her children's bedroom and saw the child's underpants that had abnormal dirt on the back. She slept and on the following day, she showed her husband who promised to talk to the child. She added that she interviewed the child on their way to the police station who told her that Mutuku had severally done bad manners to him.

14. She identified the pant in court and added that they had no dispute with the appellant who was a security guard at the school. She alleged that the child told her that the appellant had sodomised her severally and that he had threatened him. She added that they had no problem with the appellant as he would even sometimes accompany the child to school and run errands for them. She added that, she was at some time the appellant's supervisor and they never differed.

15. In cross examination, the witness told the court that, she did not see the appellant committing the offence and that she did not question the other children who were playing with the child. She could not tell what motivated the appellant to hurt the child.

16. The next witness was a clinical officer at Gachororo Health Centre one Michael Njoroge Chege. He was in court to produce P3 form filed on 19-04-2021. He stated that the complainant who was aged 9 years had complained of being sodomised in three different occasions. The complainant had been treated at Ruiru Sub County Hospital. There were bruises on the posterior of the anus and the anal muscles were loose and faecal matter was noted but there was no discharge. They referred the child for counselling. He produced the P3 form.

17. PW5 was Rose Waruguru who was working at Ruiru level 4 hospital. She testified that the child was taken to their facility on 18-04-2021 by his father who revealed that the child had been repeatedly sexually assaulted by a well known person. The child told them that he had been defiled five times with the last one being on 16-04-2021 at 6 pm. The history was that, the appellant started by inserting fingers and later progressed to inserting his penis without using condoms.

18. The witness added that, on examination, there was an old bruise at the posterior part of the anal opening and the anal sphincter muscle was loose and faecal matter was noted. HIV test was done and the child given peps and antibiotics. The witness added that the child had delayed speech and looked sad but the thought content was clear. The incident was clear and her memory on recent matters very good.

19. In cross-examination she stated that, the PRC form did not indicate the name of the victim which was an oversight but the outpatient number matched the details in the treatment notes. The form did not also indicate the name of the perpetrator. She added that she collected anal swabs for DNA test and it was for the police to follow up. She did not examine the stain but the sphincter muscle had lost its elasticity. She added that it was not normal to find faecal matter unless the sphincter muscle was loose. There was no presence of spermatozoa.

20. The investigating officer one corporal Titus Ngati was the last prosecution witness who narrated to the court how the report was received at Juja police station and the case allocated to him. He interviewed the child and he confirmed that the incident happened twice in the playground within Brightstar Girls Secondary School. He visited the scene and noted a playground near the servant quarters. According to the officer, the child knew the perpetrator. He took the child to hospital and there was confirmation that the child was defiled. He arrested the appellant on 19-04-2021 and charged him.

21. When he was cross examined, he stated that the minor was accompanied to the police station by his father but he interviewed the child in absence of the father. He visited the scene but he did not interview the neighbours or the other children who were playing with the complainant or his siblings. He did not see the need to interview the house girl.

Appellant's case

22. In his unsworn statement, the appellant told the court that he was working at Brightstar High School. On 13-04-2021, one Peter Kiithia told him that his cattle had grazed in trees belonging to one Mutuku and he promised to go on 16-04-2021. He went and sorted the issue with elders and came back. On 19-04-2021, he was arrested by his supervisor and taken to the office where he found police officers and Joseph came to the station. He denied committing the offence and claimed that he was framed.

Analysis and determination

23. I have already identified the grounds raised by the appellants. The appeal was argued by way of written submissions with the appellant having filed submissions dated 22-05-2025 while the respondent filed its submissions dated 4-09-2025.

24. The appellant has claimed that the charge sheet was defective. In his submissions, he has argued that the charge was in breach of Section 134 and 135(1) of the Criminal Procedure Code. As far as I can understand the appellant's argument in respect of this point, he contends that the date of the incidence as stated by the witnesses was at variance with what was in the charge sheet. True, the charge sheet does not give a specific date of the incidence but that does not make it defective. It is allowable for a charge to give a range of the period within which the offence is alleged to have occurred where there is a challenge as to the definite date.

25. The testimony of the complainant did not mention a specific date but mentions the month of April. He actually stated that he could not remember the specific dates on which the appellant had done it before. However, the evidence of the other witnesses including his father and the medical documents are clear that the incidences were between the period specified in the charge sheet.

Section 134 and 135(1) of the Criminal Procedure Code that the appellant has cited provide that;

> 134. 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.
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> 135(1). Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.

26. I do not see where section 135(1) comes in this argument. The appellant was charged with only one offence and an alternative count. I have perused the charge sheet and, in my view, there is nothing in the charge sheet which can be said to have been defective to the extent that the appellant could not

understand the charges he was facing. The purpose of a charge sheet is to inform an accused person of the specific offence and particulars of the same in a manner that he would understand and that would enable him to effectively prepare to defend himself. The appellant has not demonstrated to me any prejudice he suffered as a result of how the charge sheet was drawn. In Joseph Kiema Philip v Republic [2019] KEHC 7989 (KLR), it was held that;

> "The underlying principle governing charge sheets is that an accused person ought to be charged with an offence known or recognized in law. The offence that the accused is charged with must be disclosed and stated in clear terms and unambiguous manner so as to enable the accused plead to a specific charge in which he understands. This enables the accused in preparation of his defence."

27. The appellant has also argued that the trial was marred by procedural and evidential flaws. Despite this averment, the appellant has not told me what procedures were violated. I am unable to identify any procedural flaws in the proceedings. The appellant has in advancing this ground stated that the trial violated Article 50(4) of *the Constitution* in that the voir dire examination was not properly conducted and as such, his right to fair trial was violated. According to the appellant, the court did not establish whether the complainant understood the meaning, nature and purpose of an oath but only made a finding that the child was intelligent enough to testify on oath.

28. The purpose of voir dire examination is to ascertain the child's intelligence and whether they understand the importance of taking an oath and telling the truth. It was held in Japheth Mwambire Mbitha v Republic [2019] KECA 813 (KLR), that;

> "No objection was ever raised by the appellant regarding the voir dire examination or the subsequent admission of the minors' testimony. Again, it bears repeating that the purpose of voir dire is to ensure that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth."

29. I have looked at the voir dire inquiry as recorded and in my view, I have no reason to fault the way it was conducted. There are no specific questions or formular provided in law which a court must ask the witness or follow as it conducts the examination. The simple and elementary questions the trial court put to the complainant were well captured. Thereafter, the child gave evidence on oath and was cross examined and in my assessment of his evidence, he remained consistent.

30. Even where the court finds that the witness does not understand the nature and purpose of an oath, it has discretion to proceed to direct that the witness gives unsworn evidence. A witness does not get disqualified from testifying on account of failure to understand the purpose and meaning of taking an oath and the evidence of such a witness does not lose probative value on that account only. The appellant in my view has not demonstrated that the voir dire examination was faulty or it affected the probative value of the child's testimony or evidence. The child's evidence was perfectly corroborated by the other witnesses and evidence including the medical documents.

31. The credibility of the witness and their demeanour has also been attacked by the appellant. He submits that the court did not invoke sections 161 and 163(1) of the *Evidence Act* which provide that;

    161. The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

    163(1). The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him-

a. by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

b. by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

c. by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted;

d. when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character.

32. According to the appellant, the above provisions should have been applied in having the prosecution's witnesses cross examined by the prosecution as they were hostile. In my view, it is not for the appellant to determine which of the witnesses was hostile. A hostile witness is one that seeks to give evidence that is contrary to what he had recorded earlier or that who seeks or appears to testify against the party that depends on his testimony to advance its case. In such circumstances, the affected party would make an application for the witness to be declared hostile so that they can cross examine them despite being their witness.

33. In the instances where witnesses are declared hostile, their evidence losses its probative value as held in Geoffrey Kipngeno v Republic [2012] KECA 199 (KLR), thus;

> "We agree with both counsel that the evidence of a witness who is declared hostile carries little, if any, probative value. The reasoning is that a witness who materially deviates from a statement made to the police would not pass the minimum standard of a reliable witness as laid down by this Court in NDUNGU KIMANYI VS REPUBLIC [1979] KLR 282 AT PAGE 284, thus:
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> The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

34. That is why the *Evidence Act*, in Section 161 and 163 (1) gives the court the discretion to allow cross examination of own witness and impeachment of credit of witnesses. The procedure laid out in those sections ought to be followed in order to ensure that apparent inconsistencies are not explicable by the witness before he is declared hostile. In SHIGUYE VS REPUBLIC (1975) EA 191, the predecessor of this Court reiterated that the effect of declaring a witness hostile was to render his entire evidence untrustworthy.'

35. Other than giving definition of what he understands a hostile witness to mean and the purport of their evidence, the appellant has not told the court where the hostility of the witnesses in this matter comes in and why they should have been cross examined as such. He has also not pointed out what areas of the evidence should be treated as incredible and for what reasons safe for a few and insignificant contractions on the way the witnesses testified.

36. The third issue is the complaint that the court shifted the burden of proof to the appellant. What this means is that there was no sufficient evidence for the court to find the appellant guilty as charged. I have reproduced the evidence of the parties above and to start with, I have not seen anywhere in the judgment of the trial court where there was suggestion that the appellant was called upon to prove

anything. All the court found was that the evidence produced by the prosecution was sufficient and that the appellant's defence was a mere denial.

37. The ingredients of the offence of defilement are well settled which are; the age of the child, identification of the perpetrator and penetration. This was restated in the case of Dominic Kibet Mwareng v Republic [2013] KEHC 1353 (KLR), where it was held that;

> " 'The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.'

38. On the age, the appellant has submitted that the production of a copy of the birth certificate instead of the original was illegal. The birth certificate was produced without any objection from the appellant or his counsel. The fact that it was a photocopy does not make it illegal. It has been held severally that a birth certificate is not the only proof of age in matter of this nature. The parents of the complainant testified and stated that the child was born on 2-08-2011. The child himself gave the same date.

39. In addition, the court is entitled to observe the complainant and make an inference where he apparently appears to be a child. I do not believe that a child of tender years as nine can in all possibilities have features of an adult. It would not have mattered that the age was not proved through a birth certificate if the apparent age of the child was below 18. The only difference it would have made was when it came to sentencing. That said, the appellant is not permitted to raise issues he agreed with at the trial. If he had raised an objection to production of the birth certificate, that would have been an issue in this appeal.

40. The other ingredient is that of penetration. The complainant narrated that the appellant first inserted his fingers and subsequently his penis. The P3 and PCR forms produced as exhibits 3 and 4 respectively are clear that the child had bruises around the anus and his anal muscles were loose which is a sign of anal penetration. There was also presence of faecal matter which PW5 associated with the loose sphincter muscle. The child was defiled the same month the examinations were carried out and that settles any doubt of penetration.

41. The appellant has taken issue with production of the pants without there having been a DNA test on it and the appellant. He seems to state that the court relied on the pants in convicting him. This is a matter where the complainant knew the perpetrator and narrated how he was defiled which was corroborated by the P3 form and the other medical documents. Indeed, even non-production of the pant would not have watered down the strength of the evidence. It is not a must that a DNA test be carried out in all cases. If the evidence led by the prosecution is sufficient to prove penetration and the perpetrator's conduct with the victim, the court will be justified to rely on it and convict in absence of the DNA test.

42. I need not say much about the identification of the appellant. The child knew him by name, appearance and the work he did. He also knew where the appellant lived. It was stated that the appellant used to walk the child to school and run errands for the family. The child repeated to the police and the doctors what he had told his parents. The appellant in his defence did not deny that the child and his family knew him.

43. The defendant's simple and short defence was that he was not at the scene on 16-04-2021 as he had traveled home to sort a dispute which I take to be a defence of alibi. It is trite that a defence of alibi should be raised at the earliest opportunity in order to give the prosecution time and opportunity to investigate it. The appellant did not raise or give notice of the defence during the trial saving it for his unsworn statement. In any event, he has not given account of the other days before 16th April 2021 and I do agree with the trial court that the defence was a mere denial.

44. The last issues the appellant has raised in the appeal is the legality and severity of the sentence. The appellant has urged this court to find that the sentence was severe, harsh and disproportionate to the circumstances of the case and adds that recent judicial pronouncements posit that imposition of mandatory sentences by the Legislature is in conflict with the principle of separation of powers. He claims that life sentence is like a death sentence and is not deserving in this case. He asks the court to find the same as harsh and revise it.

45. Whereas I agree with the general observation that Legislature should not step into the mandate of the courts or taking away the court's discretion of imposing appropriate punishment for known offences, I must also remember that the courts are not mandated to legislate and for a court to depart from what is in the written law, a proper discourse, pleadings and petition must be presented with a purpose of making appropriate declarations. It cannot be done in appeals like this one where such decisions or declarations will be limited to the specific case and not the general public. Doing so will not serve the purpose of promoting due process of law but has potential of creating conflicting decisions and confusion in legal practice.

46. Section 8(2) of the *Sexual Offences Act* which prescribes mandatory life imprisonment remains the law and the sentence imposed upon the appellant is legal. I will not depart from what the law has provided however sympathetic the appellant's case or any other for that matter may look.

47. In conclusion, I find that this appeal has no merits and the same is hereby disallowed.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH 2026.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in absence of the appellant and Miss Torosi for the respondent.