REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

(CORAM: R. MWONGO, J.)

CRIMINAL APPEAL NO. E027 OF 2025

MARTIN MURAGE MUGO……APPELLANT

-VERSUS-

REPUBLIC……RESPONDENT

(Appeal arising from the decision of Hon. R. Njoki Kahara, in Siakago MCSO No. E007 of 2024 delivered 24th June 2024)

J U D G M E N T

The Charge

1. The appellant herein was charged in the lower court with the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act. The Particulars were that on 06th February 2024 at Kithunthiri location, Mbeere South subcounty in Embu County, the appellant intentionally and unlawfully inserted his penis into the vagina of PWM, a child aged 3 years and 10 months. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars thereof were that 06th February 2024 at Kithunthiri location, Mbeere South subcounty in Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of PWM, a child aged 3 years and 10 months.
2. At the trial, the appellant pleaded 'not guilty' to the charge. A full hearing was conducted, and the appellant was subsequently convicted and sentenced to 40 years imprisonment.

The of Appeal

3. Dissatisfied with the decision of the trial court, the appellant filed a petition of appeal dated 26th May 2025, seeking that the conviction and sentence be quashed and the appellant be set at liberty. The appeal is premised on the grounds that:
    1) The learned Magistrate erred in fact in convicting the appellant when the evidence on record could not sustain a conviction;

2) The learned Magistrate erred in law and fact when he convicted the appellant when the evidence was not corroborated;
3) That the learned trial magistrate erred in both matters of law and fact by relying on the evidence of prosecution witnesses which was inconsistent and contradictory;
4) The Magistrate erred in law by convicting the appellants on inconclusive evidence;
5) The learned magistrate erred in law and in fact when he did not seriously consider the defence of the appellant;
6) The learned Magistrate erred in law and fact in making conclusion not supported by evidence;
7) The learned Magistrate erred in law and in fact in finding that the prosecution had proved their case beyond any reasonable doubt;
8) The Magistrate erred in law and fact in disregarding the defence of the applicant;
9) The learned magistrate erred in law when she took into account extraneous matters and thus arrived at a wrong decision; and
10) The learned magistrate erred in law and fact when he failed to consider the mitigation of the appellant and therefore imposed a harsh sentence.

Evidence in the trial Court

4. PW1 was Margaret Iruma Wachira, the Chief of Kathuthiri location. She stated that the victim's mother, IMN, went to her home while carrying the victim in a leso that was blood stained. The child had a swollen neck and she advised the victim's mother to take the child to hospital first, and they did. The victim's mother told her that the appellant, the father of the child, had defiled the child. Later that day, she received a call from Patrick Mugo Kinyua, Assistant Chief, informing her that the appellant had been seen headed to Gitivore village. She asked him to arrange for his arrest and then she called the police from Kiritiri Police Station. The police re-arrested the appellant who had been arrested by the local administration officers at Kwamakiro town
5. PW2 was Mercy Wawira Ndaru a registered Clinical Officer at Kiritiri Health Center. She stated that she examined the victim. She observed that her clothes and the leso she was carried in had dried blood stains on them. The child had scratch marks and swellings all around her neck. Upon examination of the private parts, she observed that there was swelling at the labia majora, two tears around

the labia minora, one tear around the vagina, bloody vaginal discharge and the hymen was absent. She collected samples from the vagina and a high vaginal swab for further analysis and there were spermatozoa found. She concluded that this was a case of defilement given the findings. She prepared a P3 form and produced it as evidence. She also produced the PRC form as evidence together with the treatment notes.

6. PW3 was the victim's mother, IMN, who produced the victim's birth notification to prove her age was 3 years and 10 months at the time of the incident. At the time of the testimony, the victim was 4 years old. She narrated that on the day of the incident, she had left the house at 6am to go to the shop leaving the appellant and the victim sleeping in different rooms. When she returned, the child was calling for her and when she went to check, she found the child bleeding from her left eye and she had swellings on her neck. She asked the appellant what had happened while she was away and the appellant told her that the child had fallen down while trying to reach their bedroom.
7. As she carried the child in a leso to the home of PW1, she noticed that the child was also bleeding from her private parts. She suspected that the appellant had defiled her and told PW1, who advised her to go to the health center. There, the child was examined by PW2 who concluded that she had been defiled. She reported the matter at Kiritiri Police Station. She stated that when she left the house that morning to go to the shop, she had not left the child with any injuries. In cross-examination, she stated that when she left the house that morning, there was nobody else in the house besides the appellant and the child. That on asking, the child told her that it was the appellant who hurt her.
8. PW4 was PC Jemima Njeri the investigating officer from Kiritiri Police Station. She stated that at around 4pm on the day of the incident, she was at the station when she was called to investigate a defilement case that had been reported by PW3. She gathered the facts as narrated by PW3 and established that since the child was with the appellant in the house, if a stranger had come in and defiled her, the appellant would have heard as he was in the immediate next room. She concluded that the appellant was a suspect and he was arrested. On cross-examination, she stated that the house has only one door and there is no other door inside it.
9. PW5 was the victim. She gave unsworn evidence stating that that the appellant is her father. That he squeezed her neck very hard and hurt her in her private parts to which she pointed with her right hand. She also stated that she felt pain in her

private parts which she pointed to with her right hand. That blood started flowing from her private parts after the appellant lay in top of her and hurt her in her private parts.

10. In his defence, DW1, the appellant, denied the charges and said that he was wrongly implicated. He confirmed that the victim is his child.

Parties' Submissions

11. The appeal was canvassed by way of written submissions.

12. In his submissions, the appellant relied on section 63 of the Evidence Act and the cases of **Terekali & Another v Republic [1952] EACA 259 and Kinyatti v Republic [1984] KECA 78 (KLR)**. He stated that the evidence of PW1 was hearsay and it should not have been considered as credible. He argued that evidence of PW2 as a medical examiner was inconclusive and unreliable. He relied on the case of **PKW v Republic [2019] KEHC 6027 (KLR)**. It was his case that he was implicated only through a strong suspicion by PW3 but that is not enough to identify him as a perpetrator. He relied on the case of **Sawe v Republic [2003] KECA 182 (KLR)** where the court held that suspicion is not enough to sustain a conviction. He stated that the investigation was based largely on assumptions and that PW4 did not conduct a proper investigation. He relied on the case of **Bukenya v Uganda (1972) E.A 549** in support of this argument. He challenged the testimony of PW5 stating that the court did not conduct proper *voire dire* examination before recording such evidence. That in light of section 124 of the Evidence Act, there was need for corroboration of this evidence by PW5. For this, he relied on the cases of **Johnson Nyoike Muiruri v Republic [1983] KECA 1 (KLR), Kibangeny Arap Kolil (1959) E.A. 92** and **Gabriel Kamau Njoroge v Republic [1987] KECA 4 (KLR)**. He argued that the trial court failed to consider the evidence which did not meet the evidentiary threshold. He relied on the cases of **Okale v Republic [1965] EA 555** and **Woolmington v DPP 1935 A C 462**. It was also his submission that his rights under Article 50(2)(g&h) of the Constitution were violated. He relied of the case of **Albanus Mwasia Mutua v Republic [2006] KECA 346 (KLR)** and stated that he ought to have been acquitted by the trial court. He urged the court to reduce the sentence of 40 years imprisonment imposed by the trial court and stated that the same is harsh and excessive. He also relied on the case of **Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR)**.

13. The respondent relied on sections 2 and 8 (1) & (2) of the Sexual Offences Act and argued that the evidence adduced proved the offence beyond reasonable doubt. It relied on the cases of **Mwalango Chichoro Mwanjembe v Republic [2016] KECA 183 (KLR)** and **Aloyo Ewoi v. Republic (2017) eKLR** and argued that the elements of the offence had been proved through the evidence adduced by the prosecution. It argued that the court, before recording the testimony of PW5 was guided by section 19 of the Oaths and Statutory Declarations Act, and it determined that the child was not intelligent enough to understand the meaning of an oath.

14. Regarding the sentence, the prosecution argued that it was passed before the Supreme court's decision in **Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR)** was made making the life imprisonment sentence under section 8(2) of the Sexual Offences Act mandatory. That, however, nothing stops the court from enforcing the mandatory sentence prescribed. The prosecution urged the court not to unsettle the findings of the trial court on both conviction and sentence.

Issues for Determination

15. The issues for determination are as follows:

1) Whether the offence was proved beyond reasonable doubt; and
2) Whether the sentence meted out to the appellant was harsh and excessive.

Analysis and Determination

16. In the case of **Kiilu & Another v Republic (2005)1 KLR 174**, the Court of Appeal stated thus regarding the role of an appellate court:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

17. As to whether the offence was proved beyond reasonable doubt, section 8(1) and (2) of the Sexual Offences Act provide as follows:

> ***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."***

18. Therefore, the elements of the offence may be broken down as follows:

1) Proof of the age of the complainant- that the complainant was a child;
2) Proof that penetration as defined under section 2(1) of the Sexual Offences Act happened to the child;
3) Proof that the perpetrator was positively identified.

19. PW3, the victim's mother produced a birth notification indicating the child's date of birth as April 2020. In cases of defilement, the age of the victim may be proved through different means. Such was the position held in the case of **Alex v Republic [2023] KEHC 19483 (KLR)** where the court relied on the sentiments of the Court of Appeal in the case of **Mwalango Chichoro Mwanjembe v Republic (2016) eKLR** as follows; -

> "***The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof***."

20. Therefore, the birth notification was, and is, sufficient proof of the age of the child. In this case, the indication in the birth notification that she was 3 years and 10 months old was sufficient.

21. The second element to be proved is penetration. In the case of **E E v Republic [2015] eKLR** the court expressed itself on the question of penetration as follows;

> "***Penetration is defined in section 2 of the Sexual Offences Act as:***
>
> ***'Penetration' means the partial or complete insertion of the genital organ of a person in the genital organ of another person.'***
>
> ***The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement. In Bassita Hussein v***

Uganda, Supreme Court criminal appeal No. 35 of 1995, the court stated,

> ***"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by medical evidence or other evidence***.""

22. PW2 testified that when she examined the child, she observed injuries consistent with defilement. This testimony corroborates the testimony of PW5, the victim, who stated that she had been hurt in her private parts and there was bleeding. Also, PW3, the victim's mother, stated that she had found the child bleeding from her private parts when she carried her to the home of PW1.

23. The final issue is whether the appellant is the assailant. PW5, in her testimony, stated that the person who hurt her was her father, the one in the dock. PW3 stated that she left the house to go to the shop at 6am and she left the victim with her father, both inside the house. There is no evidence, either from the prosecution or the defense to suggest that someone else entered the house while PW3 was away.

24. In this case, there was no eye witness to the incident other than the minor victim. However, there is enough circumstantial evidence on record to point to the appellant as the perpetrator. Such circumstantial evidence must form, and it does, a strong chain such that the only inference that can be drawn is that of guilt. In the case of **Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR)**, this Court had this to say regarding circumstantial evidence:

> ***"However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is***

capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.'"

25. Moreover, section 124 of the Evidence Act provides that the testimony of the victim of a sexual offence is enough to identify the victim's assailant without corroboration. The provision states:

> "***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 appellant 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 appellant person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth***."

26. The appellant, through his submissions, challenged the veracity of the testimony of the minor, PW5, stating that there was no *voire dire* examination conducted before recording of her evidence. He submitted that this evidence ought to have been corroborated. From the proceedings, it is clear that the trial magistrate directed that the child gives unsworn evidence on the grounds that she was of the tender age of 4 years. Section 19 of the Oaths and Statutory Declarations Act provides guidance on taking of evidence from a child of tender years, thus:

> "***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."

27. The trial court opined that given the age of the child, she could not be sworn. This provision also means that the trial court reserved the discretion to conduct a *voire dire* examination for a child of tender years and that is why unsworn evidence was taken. The trial court indeed accorded the appellant a chance to cross-examine the child, and at the appropriate time, he stated that he had no question for the child. The child had identified him as her father and the person who hurt her on her private parts which she pointed to with her right hand.

28. Notwithstanding this testimony, the evidence of PW5 was corroborated by that of PW2 and PW3 alongside strong circumstantial evidence. Therefore, the appellant was positively identified as the assailant.

29. Following conviction, the appellant was sentenced to 40 years imprisonment, a lesser sentence than the mandatory sentence prescribed under section section 8(2) of the Sexual Offences Act, as follows:

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

30. The sentence was passed on 28th June 2024, before the Supreme Court in the case of ***Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR)*** rendered itself on the sentences prescribed under the Sexual Offences Act, on 24th July 2024. There, the Apex Court held thus:

"***We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious***."

31. At the time of sentencing, the trial court exercised discretion during sentencing even though the prescribed sentence under statute is a mandatory sentence couched in mandatory terms. Even though at the time there were decisions by superior courts interpreting the mandatory life imprisonment to mean

a definite number of years, the Supreme Court subsequently overturned that position and reiterated that until the Sexual Offences Act is amended by Parliament, the courts must impose the sentences as prescribed by statute. (See also **Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR)** and **Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR)**.

32. In light of the foregoing, the trial court did err in meting out a sentence that is not in accordance with statutory prescription.

Disposition

33. In light of the foregoing, the appeal hereby fails, and the conviction is hereby upheld. The sentence, which was unlawful at the time meted, is hereby substituted with a sentence of life imprisonment.

34. Orders accordingly.

Delivered, dated and signed at Embu High Court this 19th day of March, 2026.

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R. MWONGO
JUDGE

Delivered in the presence of:

1. Appellant present at Embu Main Prison
2. Mr. Waititu for Appellant
3. Ms. Mwaniki for the Respondent
4. Francis Munyao - Court Assistant