

**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: MATIVO, GACHOKA & KORIR,

JJ.A.) CRIMINAL APPEAL NO. NAK 100 OF

2017 BETWEEN

JOSEPH MWANGI.....APPELLANT

AND

REPUBLIC

.....

RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Narok (**Bwonong'a, J.**) dated 11th November 2019*

in

CRA No. 14 of 2017).

JUDGMENT OF THE COURT

1. The appellant was charged with the offence of defilement contrary to Section 8 (1) and (2) of the Sexual Offences Act (the Act) at the Chief Magistrate's Court at Narok in Criminal Case No. 993 of 2013. In the ensuing trial, he was convicted and sentenced to serve life imprisonment. The accusation against him was that on 2nd August 2013 at (particulars withheld) in Narok County, he intentionally and unlawfully caused his penis to penetrate the vagina of I.A., a child aged 5 years. He faced an alternative count of

committing an indecent act with a child contrary to Section 11 (1) of the Act. It was alleged that

on the above date and place, he intentionally and unlawfully touched the vagina of I.A., a girl aged 5 years with his penis. The prosecution case stood on the evidence of 5 witnesses while the appellant's defence rested on his unsworn evidence. A brief account of the prosecution and the defence case is necessary in order to provide context to grounds urged in this appeal.

2. PW1, Edwin Kiprotich, a Clinical Officer testified on behalf of Hilary Kiptoo, also a Clinical Officer who examined the complainant, prepared and signed her P3 form, but was unavailable to testify because he was recuperating at home following injuries sustained in a road accident. PW1 was familiar with his hand writing and signature having been his workmate for 4 years. It was his evidence that, upon examination at the Narok Hospital, the following were the findings: (a) generalized pain at the abdomen, (b) major labia and minor labia were torn and bruised, (c) a 3rd degree perineal tear, (d) the anus was ruptured, (e) her hymen was torn, (f) she was bleeding from both vaginal walls and her anus, (g) her genitalia was torn. She was brought to the hospital 3 days after the defilement. The clinical conclusions were that she suffered

anal and vaginal penetration, consistent with defilement. He produced the P3 form in court.

3. The complainant (PW2), recalled meeting a man who gave her a sweet. He took her to Mukuru, removed her underwear, defiled her and after he was done, he threw her into a ditch full of water. She was injured in her private parts. A woman passing by helped her out of the ditch and took her to the hospital. She said the assailant was not well known to her but she could identify him if she saw him. During the trial, she identified him at the dock.
4. PW3, the complainant's mother received a call from a jua kali operator who told her that her child had been injured. She found the child in hospital. She stated that PW2 was born on 3rd January 2008, therefore, she was aged 4 years. She produced her birth certificate. She said PW2 was bleeding from her genitals. PW2 told her that a man removed her clothes, raped her and threw her into a ditch full of water. PW2 told her she could recognize him if she saw him. PW3 said it is PW2 who pointed the appellant before he was arrested.

5. PW4, a boy aged 10 years, recalled that on the material day he was going to fetch water. He saw PW2 being called by a man. He saw him giving her a sweet, then he held her hand. On his way back from fetching the water, he did not see PW2 and the man. On his second trip to fetch water, he met the complainant with a woman helping her. She was bleeding from her private parts and her clothes were muddy. He saw the appellant days later and alerted the complainant's parents. He knew the appellant. He said the appellant used to collect waste bottles in the area and that he had seen him before.
6. PW5, a police officer was at the police station when the incident was reported. He recorded witnesses' statements and re-arrested the suspect who was brought by members of the public.
7. In his defence, the appellant stated that he was a bottle collector, and that he was going to buy bottles from a client when he was arrested by 3 persons who took him to the police station. He insisted that the complainant told him her father told her to say it was him who defiled her.

8. After addressing her mind to both the prosecution and the defence case, the trial Magistrate was satisfied that the prosecution had proved its case to the required standard and convicted the appellant and sentenced him to serve life imprisonment. The appellant's appeal to the High Court at Narok against the said decision being CRA No. 14 of 2017 was dismissed for being devoid of merit.
9. The appellant is now before this Court seeking to overturn the High Court decision contending that the learned Judge erred in (a) failing to note that penetration was not proved; (b) relying on Section 124 of the Evidence Act yet the child was neither a credible or a truthful witness; (c) he was not supplied with a police document which could have helped in his defence; (d) relying on contradictory prosecution evidence; (e) failing to note that some of the key witnesses were not called; (f) upholding the life imprisonment and failing to note that the Supreme Court removed the fetters that bound Judges and Magistrates from imposing statutory mandatory/minimum sentences provided for under Section 8 of the Sexual Offences Act.

10. We heard this appeal virtually on 10th February 2026. The appellant was unrepresented. He relied on his written submissions dated 6th August 2025. Citing **R. vs. Turnbull [1976] 3 ALL ER 549** and several other decisions which we have all considered, he submitted that his identification was not free from error. Regarding sentence, the appellant cited several decisions rendered by our Superior Courts and argued that the Supreme Court in **Francis Karioko Muruatetu & Ano. vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) [2017] eKLR (Petition 15 & 16 of 2015) [2017] KESC 2 (KLR) (14 December 2017)** ruled that courts should move away from mandatory maximum/minimum sentences which he described as unconstitutional. However, we wish to point out that the decisions cited by the appellant were rendered prior to the Supreme Court's specific directions issued on dated 6th July 2021 on the application of the **Muruatetu case** (supra) declaring the mandatory death sentence unconstitutional, generally cited as **Muruatetu & ano. vs. Republic; Katiba Institute & 4 Others (Amicus Curiae) [2021] KESC 31 (KLR) (6 July 2021) (Directions)**. Lastly, the appellant submitted that his defence was not considered.

11. Opposing the appeal, learned counsel Mr. Omutelema, Senior Assistant Director of Public Prosecutions submitted that the ingredients of the offence of defilement under Section 8 (1) (2) of the Act were proved to the required standard, that the appellant's defence was considered and rightly rejected, that the two courts below properly evaluated the evidence, that the prosecution complied with the disclosure requirements and that the alleged failure to call crucial witnesses did not leave gaps in the prosecution case. Regarding sentence, Mr Omutelema argued that the sentence imposed is lawful and urged this Court to dismiss the appeal both on conviction and sentence.

12. This is a second appeal, therefore our jurisdiction is limited to considering matters of law as stipulated by Section 361 of the Criminal Procedure Code. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at by the two courts below unless such findings are based on no evidence or are based on a misapprehension of the evidence or the courts below are demonstrably shown to have acted on wrong principles in arriving at its findings. (See **David Njoroge Macharia vs.**

Republic [2011] eKLR).

13. We will first address the issue whether the ingredients of the offence were proved to the required standard. The appellant was charged under Section 8 (1) as read with Section 8 (2) of the Act which provides: 8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. 8 (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be imprisoned for life. To succeed in an offence under the above section, the prosecution must prove beyond reasonable doubt three ingredients; namely; (a) the age of the victim; (b) penetration; and (c) identification of the offender.
14. Regarding the first ingredient, this Court has consistently held that proving the age of a victim is a critical, mandatory ingredient in establishing an offence of defilement under the Act, because the mandatory/minimum sentence is pegged directly to the victim's age. Failure to prove the age of the victim beyond reasonable doubt often results in an acquittal or a successful appeal. This Court in ***Hadson Ali Mwachongo vs. Republic [2016] eKLR*** emphasized that proving the victim's age with cogent evidence is essential, as the sentence depends on it. In ***Tot vs. Republic***

[2025] KECA 1376 this

Court reiterated that a definitive finding on age is mandatory,

and where the victim's age is in doubt, the benefit of the doubt goes to the accused. In **Mwalango Chichoro Mwanjembe vs. Republic [2016] eKLR**, this Court highlighted that while age can be proven via documents (birth certificates, baptismal cards) or oral evidence relying solely on visual observation is insufficient.

15. As mentioned earlier, PW3, the complainant's mother testified that PW2 was born on 3rd January 2008, therefore, she was aged 4 years. She produced her birth certificate. We have no reason to doubt the finding by the two courts below that the victim's age was proved to the required standard.

16. Next is the question whether penetration was proved to the required standard. In **John Mutua Munyoki vs. Republic [2017] KECA 376 (KLR)** this Court stated that in an offence of this nature, there must be penetration of the genital organ and such penetration need not be complete or absolute, partial penetration will suffice. PW1, Edwin Kiprotich, a Clinical Officer produced the complainant's P3 form on behalf of his colleague Mr. Hilary Kiptoo, also a Clinical Officer. According to the witness, upon examining PW2, the findings were generalized pain at the abdomen,

major labia and minor labia

were torn and bruised, there was a 3rd degree perineal tear, the anus was ruptured, the hymen was torn, she was bleeding from both vaginal walls and her anus. Her genitalia were torn. The conclusion was that she suffered anal and vaginal penetration, consistent with defilement. Again, we find no reason to fault the concurrent findings of the two courts below.

17. The third element is identification. This Court has consistently held that evidence of visual identification in criminal cases must be examined with the greatest care and circumspection to avoid a miscarriage of justice. The threshold for such evidence to sustain a conviction is that the identification must be positive and free from any possibility of error. In ***Kirimi vs. Republic [2025] KECA 410***, this Court reaffirmed that identification must be scrutinized carefully and must meet the threshold of being positive and free from error. In ***Odonde vs. Republic [2025] KECA 201 (KLR)***, this Court quashed a conviction because the identification evidence was too weak, raising reasonable doubt. In ***Alice vs. Republic [2025] KECA 726 (KLR)***, this Court underscored the duty of Appellate Courts to re-evaluate whether identification evidence was

sufficient to sustain a conviction.

18. According to PW3, the complainant while narrating her ordeal to her told her that she could identify her assailant if she saw him. It was her evidence that it was the complainant who pointed at the appellant at the time he was arrested. Central to the issue under consideration is the evidence of PW4, a boy aged 10 years. He testified that on the material day on his way to fetch water, he saw PW2 being called by a man. He saw the man giving PW2 a sweet then he held her hand. He saw the appellant days later and he alerted the complainant's parents. He knew the appellant. He said the appellant used to collect waste bottles. This description of the work the appellant used to do is crucial to the issue at hand. Later in his defence, the appellant from his own mouth stated *"I am a bottle collector, and I was going to buy bottles from a client when I was arrested by 3 persons who took me to the police station."* His own statement gives credence to PW4's evidence which fundamentally corroborates the complainant's evidence. PW4's description of the attacker by correctly stating his occupation falls squarely within the rules set out in the celebrated English case of ***R. vs. Turnbull [1976] 3 All ER***

549. Under these rules, a trial court must inquire into the following factors: (a) Duration: How long did the witness have

the accused under observation? (b) Distance: What was the distance between the witness and the suspect? (c) Lighting: Was the light sufficient (e.g., daylight vs. moonlight/torchlight) to allow for positive identification? (d) Obstructions: Was the view impeded by traffic, people or other objects? (e) Prior Knowledge: Did the witness know the accused before the incident? (f) Time Lapse: How much time passed between the observation and the report to the police? Description: Did the witness give a description or name of the attacker at the earliest opportunity?

19. PW4 had prior knowledge of the appellant, therefore, his was evidence of recognition. As for the complainant, the offence took place during the day and she was able to point him out which led to his arrest. We are satisfied that the evidence of identification in this case was free from error.
20. The appellant claims that the prosecution evidence was marred by contradictions. The appellant did not elaborate on this ground. Nevertheless, it is a settled principle of law that minor or trivial contradictions and discrepancies in evidence do not necessarily vitiate a trial or a conviction. Courts recognize that human recollection is fallible, and no two

witnesses perceive events exactly the same way. In ***Sigei vs. Republic [2023] KECA 154 (KLR)*** this Court held that some inconsistency can actually signify veracity and honesty, whereas unusual uniformity might suggest witness coaching. In ***Joseph Maina Mwangi vs. Republic [2000] eKLR***, the Court stated that discrepancies are bound to occur in any trial. An Appellate Court must determine if they are so fundamental as to cause prejudice or if they are inconsequential to the conviction. In ***Odago vs. Republic [2025] KECA 1018 (KLR)***, the Court reaffirmed that where discrepancies do not affect an otherwise proved case, a court is entitled to overlook them and proceed to convict.

21. Contradictions or discrepancies in evidence of witnesses that would be fatal must relate to material facts and must be substantial. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. In this regard, we have carefully considered the testimony of all the prosecution witnesses. We find no material contradictions or discrepancies to vitiate the trial.

22. The appellant argues that his defence was not considered. We have read the judgments of the two courts below. This assertion is not true. The appellant's defence was evaluated and weighed against the prosecution evidence. The courts below were persuaded, as we are that his defence did not dislodge the prosecution evidence. Therefore, the conviction was well founded on the evidence.

23. The appellant complains that a crucial witness, namely, the passerby who helped the complainant was not called to testify. Section 143 of the Evidence Act provides that: "*No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.*" The Court of Appeal in **Julius Kalewa Mutunga vs. Republic [2006] KLR** stated as follows:

"...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

24. The Eastern Court of Appeal in **Bukenya & Others vs. Uganda [1972] E.A.549** laid down the following principles:

a) The prosecution must make available all

witnesses necessary to establish the truth, even though their evidence may be inconsistent.

- b) The court has the right and the duty to call any person whose evidence appears essential to the just decision of the case.**
- c) Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.**

25. However, in the above case, the court was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the Court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.

26. As Mahoney, J. said in ***Fabre vs. Arenales [1992] 27 NSWLR 437, 449-450*** the significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. There are circumstances in which it has been recognized that such an inference is not available or, if available, is of little significance. (See ***Miller JA in Hewett vs. Medical Board of Western Australia [2004] WASCA 170***).

27. The rule only applies where a party is required to explain or contradict something. No inference can be drawn unless evidence is given of facts requiring an answer. When no challenge is made to the evidence of witnesses who are called, the inference cannot be made. A look at the record shows that PW1, PW2, PW3 and PW4's testimony is cogent and essentially unrebutted.
28. The appellant is questioning the constitutionality of the sentence largely citing decisions rendered prior to the Supreme Court directions clarifying the application of the **Muruatetu case**. It is noteworthy that, the mandatory sentence provided for the offence of defilement of a child aged 11 years or below under Section 8 (2) of the Act is life imprisonment. The Supreme Court in ***Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment)*** affirmed the lawfulness of life imprisonment prescribed under the Sexual Offences Act. Therefore, the appellant is serving a lawful sentence.

29. In conclusion, arising from our findings on all the issues determined herein above, we find that this appeal is without merit and the same is hereby dismissed in its entirety.

Dated and delivered at Nakuru this 25th day of March, 2026.

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed.

DEPUTY REGISTRAR.