REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

(CORAM: R. MWONGO, J.)

CRIMINAL APPEAL NO. E047 OF 2025

JIMMY MUSILI……………………..…………………………….….….……APPELLANT

-VERSUS-

REPUBLIC…………………………...……………….……………...……RESPONDENT

(Appeal arising from the decision of Hon. C. Kisiangani in the Runyenjes MCSO No. E015 of 2024 delivered on 13th August 2025)

JUDGMENT

The Charge

1. The appellant herein was charged with the offence of gang defilement contrary to section 10 of the Sexual Offences Act. The particulars are that on the night of 6th and 7th July 2024, at Runyenjes sublocation in Embu County, the appellant, in association with another not before court, intentionally and unlawfully caused his penis to penetrate the vagina of LM, a minor aged 13 years without consent.
2. 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 are that the night of 6th and 7th July 2024, at Runyenjes sublocation in Embu County, the appellant intentionally and unlawfully touched the vagina of FMW a girl aged 11 years with his penis without her consent.
3. The appellant pleaded 'not guilty' to the charge. After the full hearing, the trial court convicted him and sentenced him to 20 years imprisonment.

The Appeal

4. The appellant, being dissatisfied with the decision of the trial court, filed an amended petition of appeal dated 01st September 2025 seeking that the appeal be allowed, the judgment of the trial court be set aside and the appellant be set at liberty.
5. The appeal is premised on the grounds that:
    1) The learned Magistrate erred in law and in fact in relying on insufficient or no evidence to substantiate the offence of Defilement in the absence of proof of any of the primary elements of *mens rea* and *actus reus*;

2) The learned Magistrate erred in law and in fact in admitting and applying uncorroborated evidence against the appellant;
3) The learned Magistrate erred in law and fact in failing to recognize and appreciate material inconsistencies in the various accounts of evidence whose doubt should benefit the appellant;
4) The Learned Trial Magistrate erred in law and fact in placing unnecessary weight in the evidence of prosecution only without calling any independent witness to substantiate the case and failed to consider the likelihood of ill motive on the said testimony;
5) The Learned Magistrate erred in law and fact by convicting the appellant when the case against him had not been proved beyond reasonable doubt; and
6) The Learned Magistrate erred in law by dismissing the Appellants' mitigation and the fact of being a first offender and shifting the burden of proof to the Appellant.

The Evidence in the Trial Court

6. PW1 was the victim (a minor). She stated that she was at a field watching football when 2 young men approached her and asked if she wanted to greet their colleagues. She said that they were clad in what looked like police uniforms but she was not sure if they were such. She followed them and as they walked, she noticed that they had passed the police station. when she asked the 2 young men where they were taking her, they forced her into a cabin where they locked her in one of the rooms. They remained outside the door of the house and later that evening, they brought bedding, food and water.
7. She stated that it was dark but the men used a phone torch to light the room and she saw their faces. She identified the appellant as one of the men. It was her testimony that the men took turns at having sex with her and they used condoms. After they were done with her, she managed to get away in the dark and they did not see her as she carried her clothes and ran. She said that she went to a nearly homestead where she asked for help to get to the police station and she waited until dawn before reporting the incident at Runyenjes Police Station. That police officers accompanied her back to the cabin where the incident had occurred and the appellant and his counterpart were arrested there.
8. She identified the exhibits recovered at the scene and stated that she was taken to the hospital for examination and treatment. She stated that she did not scream

when the appellant and his counterpart pulled her into the cabin because she thought they were taking her to their colleagues. She stated that the appellant and his counterpart were arrested the morning following the incident and they were taken alongside herself to the government chemist in Nairobi but they disappeared.

9. She stated that she was called to identify her assailants through an identification parade and there were many people in a line. She identified the appellant by tapping him on his shoulder although she could not remember which position, he was in on the line. In cross-examination, she denied being coached to say that she was sprayed with a substance that made her unconscious. That when she ran away, she was carrying her trouser but she left her underwear behind.

10. PW2 was the victim's father who stated that on 30th June 2024, his brother told him that PW1 had taken his child's phone. He confronted PW1 about the issue of the phone and she started crying and said that she was going to the toilet but she did not come back. He tried to look for her to no avail. The following morning, he reported to the area chief that PW1 was missing. On 7th August 2024, he was informed that PW1 was at the police station and that she had been defiled.

11. He identified the clothes that PW1 was wearing and produced her birth certificate indicating that she was born in 2009. He stated that he was informed that PW1 had been defiled but he did not know by whom. On cross-examination, he stated that he met PW1 at the police station when he had gone to report her missing. That PW1 was missing from 30th June 2024. That PW1 told him that she was defiled when she went to watch football and not when she was coming from home. He did not know where PW1 was defiled.

12. PW3 was PC Eric Nyakenya of DCI Embu East. He stated that they were directed to visit the construction site of Huduma Center where PW1 was defiled in a wooden shack next to the construction. The suspected perpetrators were NYS personnel. Upon visiting the site, they found the appellant, Sobra and another person carrying things out of the wooden shack, and these 3 were taken to Runyenjes Police Station. Police found 5 used condoms inside and outside the house and a mattress and bedding marked with NYS label were recovered from the scene.

13. PW1 identified the appellant and Sobra as the people who defiled her. The suspects escaped while being escorted to Nairobi for DNA analysis but the appellant was rearrested in Ukambani. PW1 was taken to hospital for

examination and treatment. In cross-examination, PW3 stated that when he arrived at the scene, he found 3 suspects including the appellant. That the house where the scene was did not have a door and there was no way of locking someone inside it.

14. PW4 was Inspector Peter Kimani who conducted the identification parade. He stated that he searched for people with similar features and placed them in the parade with the appellant being among them, a lineup of 9 men. PW1 selected the appellant from the lineup and the appellant stated he was satisfied with the process and he signed the identification parade form. The witness also signed the form dated 04th August 2024 and handed it over to the OCS. He produced it as evidence.

15. PW5 was Ann Githinji a Clinical Officer at Runyenjes Level 5 hospital. She testified that upon examination, the victim had injuries on her urethral orifice, cervix and vaginal wall and her hymen was broken. The victim also had a slight bloody discharge from her private parts. PW5 produced the P3 form that was authored by her colleague Dennis Karuri.

16. PW6 was PC Cecily Muthoni Kariuki, the investigating officer. She stated that the incident was reported by PW1 who said that she had been gang defiled by NYS officers who were constructing the Huduma Center in the town. When the police visited the scene, they found 2 men carrying the mattress and bedding out of the scene and they were arrested. They were escorted to the government chemist but while enroute, they escaped, but the appellant was arrested in Mwingi. His counterpart is still at large. The mattress and bedding found at the scene was produced as evidence alongside all other items found there. In cross-examination, she stated that the house had a door that was lockable. She stated that they collected used condoms and other samples for delivery to the government chemist for analysis, but the results were not ready at the time of the testimony.

17. PW7 was Emily Okworo, an Analyst from the government chemist. She stated that she examined samples from PW1, the appellant, the other accused person named Jeremiah Sobra and 5 used condoms recovered from the scene. She found that the DNA profile from one of the used condoms matched the DNA from the appellant’s buccal swab. The government analysist report was produced as evidence.

18. DW1 was the appellant who stated that he was part of the delegation of NYS officers constructing the Huduma Center at Runyenjes. He stated that PW1

went to the place where he was working and asked for drinking water. He took her to the camp and gave her drinking water. She started crying and told him that she had been chased away from home for stealing money and she had no place to stay.

19. He told her to go to the place where she had been staying since 30th June 2024 but she refused. He decided to take her to a place which was a make-shift store and then gave her some food. He then gave her some bedding later in the evening. When he was about to leave, PW1 asked why he was leaving her there alone and so he stayed with her. He stated that she tempted him and he is the only one who slept with her. He said that he had gotten into trouble that he did not call on himself and that it was PW1 who came to him.

Parties' Submissions

20. In his submissions, the appellant argued that PW1's testimony was recorded before *voire dire* was conducted, hence it is not credible evidence. He relied on the cases of **Muiruri v Republic [1983] KEHC 23 (KLR), Evans Nyamari Ayako v Republic [2017] KEHC 5570 (KLR)** and **Titus Muindi Mukoma v Republic [2017] KECA 350 (KLR)** and argued that failure to conduct an identification parade makes the case fatal. He challenged identification of the victim's assailant and stated that the identification parade shows that only the appellant was identified yet the rest of evidence shows that there were 2 suspects. Reliance was placed on the case of **Terekali v Republic (1952) EACA** and he stated that identification of an assailant must be devoid of error for a conviction to hold.

21. He submitted that the elements of the offence were not proved to the standard required and he relied on the cases of **Fappyton Mutuku Ngui v Republic [2012] KEHC 5491 (KLR) and Elly Otieno Alose v Republic [2019] KEHC 9022 (KLR).** He submitted that the government analyst report contravenes section 77 of the Evidence Act. He also relied on the cases of **R. v Mohan [1994] 2 SCR 9, Emmanuel Mwadime v Republic [2016] KEHC 288 (KLR)** and **Parvin Singh Dhalay v Republic [1997] KECA 379 (KLR)**. He also argued that it is suspect that the complainant was allegedly abused by 2 people but one of them was never arraigned. He urged the court to set aside the conviction and sentence on the basis of reasonable doubt raised.

22. In its submissions, the respondent relied on section 10 of the Sexual offences Act and the case of **CMK v Republic [2025] KEHC 5584 (KLR)** for the ingredients of the offence. It submitted that based on the prosecution's evidence, the elements of the offence were proved beyond reasonable doubt. Regarding *voire dire*, it relied on the cases of **Maripett Loonkomok v Republic [2016] KECA 520 (KLR)** and **Athumani Ali Mwinyi -Vs- Republic Cr.Appeal No.11 of 2015**. It argued that even if the evidence of the complainant is not taken into account, there is other evidence identifying the appellant as the assailant.

Issues for Determination

23. The issues for determination are as follows:

1) Whether failure to conduct *voire dire* with respect to PW1's evidence renders the appellant's conviction unsafe;
2) Where or not the offence was proved beyond reasonable doubt;
3) Whether or not the sentence should be set aside.

Analysis and Determination

24. The role of the High Court in an appeal such as this is to re-evaluate the evidence adduced before the trial court and make its own conclusions. In the case of **Kiilu & Another v. Republic [2005]1 KLR 174**, the Court of Appeal stated that mandate thus:

> **"*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*."**

25. The first issue is whether the trial court's failure to conduct *voire dire* renders the conviction unsafe.

26. From the trial court proceedings, the prosecutor informed the court that the first witness was a minor. The court recorded the name of the witness and

indicated that this witness gave sworn evidence. It then recorded her testimony. Section 19 of the Oaths and Statutory Declarations Act provides that:

> ***"(1) 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.***
>
> ***(2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment."*** *[Emphasis added]*

27. The trial court was required to give its opinion on whether PW1 understood the proceedings, the meaning of an oath and whether she was possessed of intelligence to testify under oath. PW1 gave sworn evidence but the trial court did not record *voire dire* prior to placing the witness under oath. Whatever the case, the court is obligated to give its opinion of the witness, in this case, a minor, before recording their evidence. Section 125(1) of the Evidence Act provides:

> ***"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause."***

28. In the case of **Maripett Loonkomok v Republic [2016] KECA 520 (KLR)**, the Court of Appeal discussed who is a child of tender years given that the Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on the matter. The court stated:

"***The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that <u>the phrase "a child of tender years" meant a child under the age of 14 years.</u> The only statutory definition of a "child of tender years" is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R, Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that 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. <u>It follows therefore that the time-honored 14 years remains the correct threshold for voire dire examination</u>. It follows from a long line of decisions that voire 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 <u>where voire dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction.</u>***""
>
> *[Emphasis added]*

29. A *Voire dire* examination is required in specified cases but there is no specific formula for conducting it. Discretion is left to the trial court to determine how it will satisfy itself of the competency of a child witness. Courts have previously given guidance to the effect that before recording the testimony of a child witness, whether under oath or not, it is preferred that a trial magistrate records reasons why he/she thinks the witness is competent to testify under oath. In the case of **Julius Kiunga M'birithia v Republic [2013] KEHC 546 (KLR)**, the court stated:

"…it is desirable that the magistrate records specifically that he is satisfied that the child understands the duty of telling the truth..."

30. In the present case, the trial court received the evidence of PW1 without conducting *voire dire* examination prior to recording the evidence yet she is classified as a child of tender years (**Maripett Loonkomok v Republic(supra)**). Further, the Court did not even indicate whether PW1 understood the nature of an oath or whether the court was justified to receive PW1's evidence. The evidence of PW1 must, therefore, be held as not credible and it cannot be used as the only evidence on identification of the assailant or of the offence under section 124 of the Evidence Act.

31. Looking at the totality of evidence in this case, it is necessary that this court must carefully re-examine that evidence to find whether or not the conviction was safe. Section 10 of the Sexual Offences Act provides:

> "***Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life***."

32. The appellant has strongly contended that there were 2 accused persons but he ended up being the only one arraigned and charged in court. The investigating officer confirmed this and also stated that the other accused person is still at large. The appellant argued that on this basis, he should not be held culpable for the offence. Section 2 of the Sexual Offences Act provides that **"gang" means two or more persons**. Further, Section 21 of the Penal Code provides thus:

> "***When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and <u>in the prosecution of such purpose an offence is committed</u> of such a nature that its commission was a probable consequence of the prosecution of such purpose, <u>each of them is deemed to have committed</u> the offence.***" *[Emphasis added]*

33. Given these provisions, the appellant must be held individually culpable for the offence if it is proved and he may be convicted even though he was in the company of another or others at the time of committing the offence.

34. The elements of the offence of defilement are defined under section 8(1) as follows:

"***A person who commits an act which causes penetration with a child is guilty of an offence termed defilement***."

35. In this case, the offence is said to have been committed by more than one person, hence the provisions of section 10 of the Sexual Offences Act apply. Therefore, it must be proved that the victim was a child at the time of the incident and there must be proof of penetration; but in doing so, the testimony of PW1 should be excluded for the reasons already stated hereinbefore.

36. PW2 produced the birth certificate of PW1 which indicated that she was born in 2009 and the incident occurred in 2024. The victim was thus definitely a child within the meaning of the Children Act. Regarding proof of penetration, PW5 produced a P3 form and testified that the victim had injuries on her urethral orifice, cervix and vaginal wall and her hymen was broken. Clearly, this evidence is sufficient proof of penetration.

37. The next element is to examine whether the appellant was in the company of another or others in perpetrating the offence. Once again, the testimony of PW1 cannot be re-examined in determining this element. PW3 testified that he was part of a team of police officers who visited the scene where the appellant was found in the company of 2 others. At the scene, they found the suspects removing some beddings and other things from the wooden shack which is next to the Huduma Center construction site where the appellant and his colleagues were working.

38. PW6 produced the items found at the scene as evidence and among these, were used condoms. These condoms were analyzed by the government chemist and a report was produced as evidence by PW7. According to the report produced by PW7, samples were received from the appellant, the complainant and one Jeremiah Sobra. From analysis of the samples, PW7 concluded that the DNA profiles generated from 4 of the 5 condoms found matched the DNA profiles from the appellant's buccal swab. She also found that the DNA profiles generated from the outside of the condoms matched the DNA profiles from the complainant's buccal swab. This is strong forensic evidence linking the appellant to the complaint.

39. In his defense, the appellant stated that PW1 came to the place where he was working as part of a group of NYS officers constructing the Huduma Center. She asked for drinking water and he took her to the camp where they were staying and gave her some food and water. That PW1 started crying saying that she had nowhere to stay. He asked her to go back to where she had been

staying since 30th June 2024, but that she refused. As it got dark, he gave her some bedding and more food and then left her to sleep in a makeshift store. That the appellant asked him not to leave her alone but she asked him to stay with her. According to the appellant, she tempted him and that he was the only person who slept with her.

Conclusions and Disposition

40. Upon considering the totality of the evidence, I am not convinced that the trial court misconstrued the evidence. The testimonies of the prosecution and the defense are in consonance and prove that the appellant penetrated PW1, a minor, contrary to section 8(1) of the Sexual Offences Act. In doing so, he was in the company of another person who is still at large, but he is nevertheless individually deemed to have committed the offence in terms of Section 21 Penal Code.

41. Accordingly, the trial Court did not err in convicting the appellant. To that extent, this court affirms the conviction by the trial court.

42. Following conviction, the appellant was sentenced to 20 years imprisonment. The sentence prescribed for this offence under section 10 of the Sexual Offences Act is imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life. Therefore, the sentence meted by the trial court is within the range of limits set by the law and there is no basis for reviewing the same.

43. Accordingly, I find that the appeal has no merit and it is hereby dismissed in its entirety.

44. Orders accordingly.

Delivered, dated and signed at Embu High Court this 22nd day of April, 2026.

____

R. MWONGO
JUDGE

Delivered in the presence of:

1. Appellant present in Court
2. Miss Mwaniki for the Respondent
3. Stella Kithinji - Court Assistant