**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CRIMINAL APPEAL NO. E014 OF 2025**

**MUTUKU MBITHI ……**

**APPELLANT**

**VERSUS**

**REPUBLIC ……**

**RESPONDENT**

***(An appeal from the conviction and sentence in the SPM Magistrates Court at Tawa, Sexual Offence Case No. 14 of 2020, Judgment delivered on by Hon. S. Jalang'o SPM.)***

**JUDGMENT**

1. The Appellant was charged with the offence of Defilement of a child contrary to **Section 8 (1)** as read with **Sub-section (2)** of the **Sexual Offences Act No. 3 of 2006.** The particulars of the charge were that, on 7th April, 2020 at

Kako location in Mbooni East district within Makueni county, intentionally and unlawfully caused his penis to penetrate the vagina of **RWM** a child aged 6 years. The Court found him guilty and convicted of the said offence. He was sentenced to serve life imprisonment.

2. The Appellant was dissatisfied and brought this appeal against the conviction and the sentence. The Appeal was canvassed by way of written submissions. Both parties filed their respective submissions and the Court has considered the same at length.
3. Having considered the Grounds of Appeal and the submissions made by the parties, I find that the issue for determination is whether the offence of defilement was proven to the required standard, thereby warranting a conviction.
4. This being a first Appeal, this Court has a duty to revisit the evidence tendered before the trial court afresh, evaluate, analyze it, and come to its own independent conclusion, but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and

hearing them give evidence, and give allowance for that. (See **Okeno vs. Republic (1972) EA 32** and **Mark Oiruri Mose vs. R (2013) eKLR.**

5. The Court in **George Opondo Olunga vs. Republic [2016] eKLR** established that the ingredients of the offence of defilement are: the age of the victim, penetration, and proper identification of the perpetrator.
6. I shall start with the element of Penetration. Courts have held that Penetration is proved through the evidence of the victim corroborated by medical evidence. In **DS v Republic [2022] KEHC 2502 (KLR)**, the Court held that as follows;

> ***"19. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the***

***evidence of the child, in order to determine whether there was penetration".***

7. The Complainant was **PW1**. She testified that the defilement happened in the Appellant's house and described how the Appellant allegedly defiled her. She also produced medical evidence to support her testimony. I have seen the PRC Form, medical notes, and P3 Form.
8. I have reviewed how the lower Court took the evidence of the Minor. According to the evidence on record, the Minor was 9 years when she testified in Court. The Court went ahead to conduct a *voire dire* examination to determine whether she understood the nature of the oath.
9. The Court of Appeal has settled the law on how the *voire dire* examination should be conducted. In **James Mwangi Muriithi v Republic [2016] eKLR**, after noting that **Section 19** of the **Oaths and Statutory Declarations Act** does not provide a format for *voire dire* examination, the Court observed that the examination can take two formats and stated as follows:

***"In Sula versus Uganda [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then makes its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter."***

10. In **Kilwake v Republic (Criminal Appeal 129 of 2014) [2019] KECA 5 (KLR)**, the trial Court did not record the actual question put to the witness, but it recorded the answers that the Minor gave to the said questions. Court of Appeal approved the *voire dire* examination noting that the answers recorded from the examination were sufficient to determine whether the minor

understood the nature of the oath. The Court observed as follows;

> ***"In this appeal, although the actual question put to the witness by the trial magistrate were not recorded, from the examination the trial magistrate elicited from PW2 that he was 13 years old and a standard 4 pupil at [particulars withheld] Primary School. He attended the [particulars withheld] Church near Elgon View and knew that it was important to tell the truth otherwise he would burn in hell. From the answers the trial magistrate recorded that PW2 was intelligent enough, understood the duty to tell the truth, and allowed him to give sworn evidence.***
>
> ***26. For our part, we are satisfied from the record, as the trial magistrate was, that PW2 understood the oath and the duty to tell the truth. <u>The mere fact that the trial court did not record the</u>***

***<u>questions put to PW2, though it was desirable to do so, is not enough to vitiate the voir dire examination, because the answers by the witness confirm he understood the nature of the oath and the duty to tell the truth.</u> This ground of appeal too is bereft of merit.***

11. I have seen the record and the typed proceedings. The *voire dire* examination conducted at the lower Court did not take any of the format alluded to by the Court of Appeal. The Court did not record the questions that were put to the Minor. In addition, the Court did not record the answers given by the Minor verbatim in the first person. The record shows that the Court just made a conclusion that the minor knew the importance of speaking the truth. It went ahead and directed that the Minor be sworn.

12. Based on these facts, I find that the *voire dire* examination of **PW1,** the Minor, was not properly conducted and thus the trial magistrate did not have a verifiable way to determine whether the Minor understood the nature of the oath and whether she should give sworn or

unsworn evidence. This Court cannot, as a result, independently confirm whether the Minor appreciated the nature of an oath and the duty to speak the truth. As a result, I vitiate the *voire dire* examination.

13. I note that the Minor's grandmother did not testify at the trial. The minor stated that it was her grandmother who first discovered that she had been defiled and who accompanied the Minor to the hospital. From her testimony, it appears that her grandmother came to the compound and found her missing, after which she started looking for her. The minor testified that her grandmother confronted the Appellant, after which she came out of his house.

14. Based on these facts, I find that this case was a mistrial. The Court would have reached a different conclusion if the grandmother, who had first-hand knowledge of the alleged defilement, had testified at the trial. In that case, the court would have used her testimony and the medical reports to determine whether the offence had been committed.

15. The offence attracts a serious sentence, and the Court, as an appellate Court, needs to assure itself that the trial was conducted in the most appropriate way. In the end, the appeal succeeds, although on different grounds than those raised by the Appellant.

16. The Court has considered ordering a retrial, but also considers that the Appellant has been in custody, and about six years have passed since the dates complained of as constituting the offence, meaning a fair trial may no longer be possible.

**Disposition**

17. The Appeal succeeds.

18. The Conviction for the offense of Defilement is hereby quashed and the sentence is set aside.

19. The Appellant be set at liberty forthwith unless otherwise lawfully held.

20. Orders accordingly.

**DATED, DELIVERED** and **SIGNED** at **NAIROBI** through the Microsoft Teams Online Platform on this **14TH** day of **APRIL, 2026.**

**.....**

**HON. C. KENDAGOR**

**JUDGE**

**In the presence of:**

Court Assistant: Beryl

Appellant – present

Ms. Musango, ODPP