



**Warui v Republic (Criminal Appeal E032 of 2024)  
[2026] KEHC 5006 (KLR) (16 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 5006 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL APPEAL E032 OF 2024  
LN MUTENDE, J  
APRIL 16, 2026**

**BETWEEN**

**MICHAEL NDIRANGU WARUI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Michael Ndirangu Warui, the Appellant, was charged with the offence of Defilement contrary to Section 8(1)(3) of the *Sexual Offences Act*. Particulars of the offence were that on the 18<sup>th</sup> January, 2020 at Gatimu Location, Nyandarua West Sub-County within Nyandarua County, the accused intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of VNM a child aged 15 years.
2. In the alternative, he faced the charge of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars of the offence being that on 18<sup>th</sup> January, 2020, at Gatimu Location Nyandarua West Sub-County within Nyandarua County intentionally and unlawfully caused his penis to come into contact with the vagina of VNM a child aged 15 years.
3. The Appellant denied the allegations and upon full trial he was found guilty, convicted and sentenced to serve fifteen (15) years imprisonment for the offence of defilement.
4. Aggrieved, the Appellant appeals on grounds that;
  1. The learned trial Magistrate erred in law and fact in ignoring and/or failing to dislodge the contents of the written submissions filed for and on behalf of the Appellant.



2. The learned trial Magistrate erred in law and fact in finding and holding that the act of penetration was proved beyond reasonable doubt by the prosecution.
  3. The learned trial Magistrate erred in law and fact in failing to find that there were various inconsistencies in the testimonies given by prosecution witnesses that raised doubt in the prosecution's case.
  4. The learned trial Magistrate erred in law and fact in failing to find that the relationship between the Complainant and the Appellant as alleged was not proved beyond reasonable doubt.
  5. The learned trial Magistrate erred in law and fact in delving into the arena to seal the gap for the prosecution on the issue of the exact time the incident was said to have taken place even when the prosecution led no witness to that aspect.
  6. The learned trial Magistrate erred in law and fact in failing to find that the medical evidence produced by the prosecution witness failed to corroborate fully the testimony of the Complainant.
  7. The learned trial Magistrate erred in law and fact in failing to find that crucial exhibits were not produced before the court the next effect of which was to render the prosecution's case unproved to the requisite standards.
  8. The learned trial Magistrate erred in law and in fact in shifting the burden of dislodging the Appellant's defence of alibi from the prosecution to the court.
  9. The learned trial Magistrate erred in law and fact in failing to find that the Appellant's defence of alibi was not dislodged by the prosecution.
  10. The learned trial Magistrate erred in law and fact in failing to find that the discrepancy between the P3 form and the PRC form produced in court rendered the Complainant's testimony uncorroborated, medically.
  11. The learned trial Magistrate erred in law and fact in failing to exercise her discretion in sentencing the Appellant and instead limited herself to the 15 years provided for under Section 8(4) of the [Sexual Offences Act](#) Cap. 62 A as if the same was a minimum sentence while it was not and is not.
  12. The conviction is dangerous and against the weight of the evidence.
  13. The minimum sentence is excessive and unconstitutional.
5. Briefly, facts of the case were that the Complainant was a student at Nyandarua Vocational Rehabilitation Centre, taking a course of knitting where the Appellant worked as a cook.
  6. On the material date she went to the kitchen to request for more tea following her condition and the Appellant told her to serve herself. She did and on wanting to leave the kitchen she noticed the door was locked. She was wooed with lovely words and taken to the kitchen bathroom where she was molested. Upon being released she went to the dormitory, while walking with significant difficulty. A fellow student went and asked why she was sleeping at the time and she told her that she had been defiled by Michael.



7. The matter was reported to the centre manager James Muriuki Nyamu who confirmed from the Complainant what had happened. He caused the matter to be reported to Gatimu Police Station. PW4 No. 86235 PC Alex Wambua arrested the Appellant. The Complainant was escorted to Nyahururu County Hospital, was examined and found with a freshly broken hymen. Investigations were concluded which culminated into the Appellant being charged.
8. Upon being placed on his defence the Appellant denied the allegations. He explained that in the year 2020 he used to work at the Nyandarua Vocational Rehabilitation Centre as a cook. That on the 18<sup>th</sup> January, 2020 he served food at 12.00pm then left going to seek treatment at Nyeri Hospital. That he requested Andrew to help him with the luggage and while on the way at about 1.30pm he received a call from Moses Wambugu who said he was at his place of work and wanted to greet him but he was not around and he told him so. He denied having been present on the date of the alleged incident although he knew the Complainant.
9. He called witnesses DW2 Andrew Lensaya Oyola a herdsman at the centre who testified that on 18<sup>th</sup> January, 2020 the Appellant requested him to assist him as he was unwell. That they served food which students took then he escorted him to Nyahururu as he was going to hospital and he did not hear of an alleged defilement.
10. DW3 Moses Wambugu stated that he had gone to Nyahururu for a family re-union and he decided to greet the Appellant at the Rehabilitation Centre. He found a padlock on the door and when he called him on phone he said he was on his way to Nyeri.
11. Submissions were tendered and the trial court on consideration of evidence on record found that the victim was a minor; the act of penetration as described by the victim was corroborated by medical evidence; and, the perpetrator was not a stranger to the victim. On the defence put up, the court found that the offence was committed during lunch hour when the victim went for tea. And, that at that particular time the perpetrator was still at the dining area hence the conviction.
12. The appeal was canvassed through written submissions following directions taken. It is submitted by the Appellant through Maina P. Kairu and Co. Advocates that the trial court failed to give consideration to the submissions filed on behalf of the Appellant as the court's judgment did not indicate that the written submissions were not analyzed which was in violation of the Appellant's rights as stated in Amollo W. Wilson (Application E014 of 2023(2023) KESC 71 (KLR).
13. That it was inconceivable that penetration could occur with the legs of the victim tied together. That the prosecution did not seek proper explanation of what was referred to as 'PUT HIS THING'.... 'KITU YA KUKOJOA' which the trial Magistrate translated to mean 'vagina'.
14. That evidence of a broken hymen is not in itself conclusive evidence of penetration. Reliance was placed on the case of Nicodemus Bange Motatiro v Republic [2021] eKLR where it was held thus;

“In the instant case, the complainant explained to the court what happened to her in Kiswahili as follows:-

“alinifanya kwa sehemu yangu ya mkojo kwa sehemu yake ya mkojo.”

In the trial court's judgment, the court said that the above sentence means: “This in ordinary meaning meant insertion of the penis into the vagina.” I have no idea how the trial court understood the explanation given by the complainant. There is no indication that the appellant inserted his genital organ into the complainant's genitalia. The complete explanation was not clear at all and clarification should have been sought.”



15. That there were various inconsistencies in evidence adduced by the victim, evidence that should be dismissed as doubtful and unreliable as held in *Ndung'u Kimanyi v Republic* [1979] KLR 282.
16. The trial court is faulted for delving into the arena by filling in the gaps in the prosecution's case. That as held in *CMK v Republic* (2015) eKLR a broken hymen can be caused by other factors and the court must consider medical evidence and other circumstances and exhibits mentioned were not produced.
17. That the alibi defence that was confirmed was disregarded and sentence is discretionary but the trial court imposed the minimum sentence provided by statute.
18. In a comeback the Respondent through learned prosecution counsel Ms. Anastacia Mumbe submitted that as held in *Dominic Kibet Mwareng v Republic* [2013] eKLR it was established that the offence of defilement is rooted in three (3) main ingredients namely, the age of the victim; penetration; and proper identification of the perpetrator.
19. That a birth certificate was adduced which proved the age of the minor. That an explanation was given of how the perpetrator tied the victim, made her lie on the foam facing upwards, removed her inner pant but not completely and lay on her inserting his thing in her vagina. That discharge came out of his thing and she felt pain. And once he was done, he untied her and told her not to tell anyone. And on examination, she had sustained a fresh broken hymen and inflammation.
20. However, counsel proceeded to submit that the Complainant was examined some two (2) days later therefore while consistent with sexual assault, did not conclusively link the injuries to the Appellant. That the victim testified that her hands, legs and mouth were tied. How could penetration take place with the Appellant being on top of her? Further, that the victim stated that he put his 'thing' in her vagina but never clarified what she meant by this 'thing'. That the object used to penetrate the victim was not clearly established. To that end it is urged that circumstances of the offence which resulted to penetration were not clearly demonstrated beyond reasonable doubt.
21. On identification, it is urged that although it is undisputed that the Appellant was a cook at the Rehabilitation Centre the Appellant testified that he travelled to Nyeri Hospital for treatment and was still undergoing treatment as of 18<sup>th</sup> January, 2020. That the Appellant produced D-Exhibit 1, a medical card and called 2 witnesses to support his case. That the alibi evidence was not dislodged by the State and the court only stated that his defence amounted to a mere denial. That although the victim and the Appellant were known to each other, it is conceded that it was not proved beyond reasonable doubt that the Appellant was at the scene on the material date.
22. This being a first appellate court it is duty bound to re-examine evidence adduced at trial and scrutinize the findings bearing in mind that it did not have the opportunity of seeing or hearing witnesses to assess their demeanour, then form its independent conclusions. This, was summed up in *Okeno v Republic* (1972) EA 32 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 (*Pandya v. R.*, [1957] E. A. 336) 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. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). 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; it must make its own findings and draw its own 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, see *Peters v. Sunday Post*, [1958] E. A. 424.”

23. This is a case where the learned prosecution counsel concluded written submissions thus;
- “In the premises, we partially concede to the appeal and leave the just determination of this appeal to the discretion of the court.”
24. Indeed, the learned prosecution counsel was persuaded by arguments put forth by the Appellant such that the case of the state was stretched on appeal as the prosecution counsel shredded it materially in the course of submissions.
25. In *Kiilu & Another v Republi* [2005] 1KLR 174 the Court of Appeal stated that;
- “An appellant on a first appeal was entitled to expect that 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 had to itself weigh conflicting evidence and draw its own conclusions.
- It was not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts’ findings and conclusions; it had make its own findings and draw its own conclusions. Only then could it decide whether the trial court’s findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.”
26. Any sentiments given in submissions must be based on facts and law and as stated by case law the court retains the discretion to act independently analyzing evidence presented hence come up with its own conclusion. To reach a decision it does not act on the inference of the commission. The court does not just rule in favour of the Appellant because the State has conceded as it is not bound.
27. Proof of defilement is established where evidence proves sexual violation as provided by Section 8(1) of the *Sexual Offences Act* as follows;
- A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
28. Following the definition, elements of defilement are;
- i. Age of victim
  - ii. The act of penetration
  - iii. Positive identification of the perpetrator
29. The Appellant has listed various complaints. The initial one being that the trial court failed to consider submissions filed by the Appellant at trial. At the outset, I wish to point out that a perusal of the *Amollo* case (*supra*) cited has totally nothing to do with either submissions or Article 50 of *the Constitution* as submitted. The matter, an appeal from the Court of Appeal is in respect of certification for leave to appeal on a matter involving general public importance, an application that was dismissed as it was not indicated which of the Supreme Court jurisdiction the Applicant sought to invoke.
30. I have perused the judgment written by the trial court. As required, the judgment contains points for determination. Although the trial court did not specifically indicate that it considered submissions of



the parties, it is apparent that the points for determination included what was tendered in evidence being witness testimonies, medical documents and even arguments that were presented by the firm of Mathea Gikunju & Co. Advocates who then represented the Appellant. And it was upon the facts, evidence and law that the decision was based. Otherwise, failure of the court to reduce the submissions which were not evidence into writing as originally presented cannot amount to an omission calling for allowing of the appeal.

31. On the question of age, in *Hillary Nyongesa v Republic* [2010] eKLR (Criminal Appeal No. 123 of 2009 Eldoret) it was held that;

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved. Anything else is not good at all. It will not suffice. And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim.”

32. In *Francis Omuroni v Uganda* Criminal Appeal No. 2 of 2000 the Court of Appeal stated that;

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense...”

33. The victim did not know her age but evidence of a birth certificate was adduced which proved that she was born on 6<sup>th</sup> November, 2003. This was evidence that as at 18<sup>th</sup> January, 2020 she was 16 years old. Section 2 of the *Children Act* provide thus;

“child” means an individual who has not attained the age of eighteen years;

34. At the time of the incident she was a minor.

35. On the question whether or not penetration did occur; Section 2 of the *Sexual Offences Act* defines penetration as follows;

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

36. The victim herein explained that the assailant locked the door and took her to the kitchen bathroom. He tied her legs, hands, and mouth and made her lie on the foam facing upward and he put his ‘thing’ into her vagina. She felt pain and there was some discharge. She further explained that the individual did not remove the inner pant completely. And, when he was done, he untied her. He released her to go and he also went to his house. On cross – examination she said that the act was committed at about 12.00pm of 18<sup>th</sup> November, 2020.

37. The witness testified on 23<sup>rd</sup> February, 2023 and when the Appellant engaged counsel, she was recalled on 22<sup>nd</sup> June, 2023 and she gave the same narrative of the individual having tied her, pulled down her inner pant prior to penetrating her. According to the PRC form and general outpatient record, the victim was escorted to hospital on 20<sup>th</sup> January, 2020 and on examination she had an inflamed vagina with a freshly broken hymen though there was no bleeding then. On cross – examination of the Clinical Officer he stated that the hymen was recently torn but there was no indication of the victim having harmed herself.

38. As submitted, a freshly torn hymen may be caused by other physical activities including sexual intercourse involving penetration which tears the hymen. In the instant case, it would be important



to consider events as they unfolded. The victim went to the dormitory and decided to sleep. PW2 Margaret Wanjiku Maina, a Chef/Storekeeper and/or Cateress stated that there were two (2) other cooks Michael and Jecinta and Michael stayed inside the institution's compound. She was informed by Jecinta of a report that the victim wanted to make.

39. Upon giving her audience she reported that she had been defiled and she accompanied her to hospital for examination and treatment. Penetration was proved. In *George Kioji v Republic*, Nyeri Criminal Appeal No. 270 of 2012, the Court of Appeal stated that;

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

40. Section 124 of the *Evidence Act* provides;

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

41. On the question of identification, the victim identified the Appellant right at the outset as the perpetrator. She stated that when she went for more tea she found the Appellant at the kitchen who allowed her to take more tea and he gave her some chores as well which was the norm according to PW3 James Muriuki Nyamu the manager of the institution. When the matter was reported to PW2, the victim identified the perpetrator as Michael. When the matter was reported to PW3, he gave her audience, and she said the perpetrator of the act was Michael the cook. She gave the same narrative of what transpired.
42. When taken to the police station she told PW4 that she had been defiled by Michael the cook in the kitchen and he visited the scene and arrested the Appellant after the victim positively identified him. The victim suffered from epilepsy, had intellectual incapacity as well but could express herself very well and her memory was good as acknowledged by the defence counsel.
43. It is however argued by the Appellant that he did not commit the offence because he was not at the scene having left the institution on the material date, 18<sup>th</sup> January, 2020 at 12.05pm (according to the handwritten proceedings). Although the typed proceedings did erroneously indicate the date as 15<sup>th</sup> January, 2020 which the learned prosecution counsel opted to go by in submissions, although the Appellant's submissions focused on the actual date, the 18<sup>th</sup> January, 2020.



44. At trial, the Appellant relied on the case of *Kiarie v Republic* [1984] KLR where it was stated that;
- “An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”
45. No doubt if an alibi defence is raised the prosecution is duty bound to prove otherwise. In the instant case it was the duty of the prosecution to prove that at or about 12.05pm the Appellant was at the kitchen. The Appellant called evidence to explain that he was treated at Nyeri Consolata Hospital Mathari Annex at 3.07pm Saturday, 18<sup>th</sup> January, 2020, and was seen by the doctor at 3.32pm ;some 60 -80 kilometers away from the Rehabilitation Centre (Judicial Notice).
46. PW2 stated that at the time they had two (2) cooks Michael and Jecinta. There was also Eunice who would help in cleaning. The prosecution evidence hinged on there having been only one male cook at the institution. Further, it is admitted that the Appellant knew the victim very well and it was not denied that equally the victim knew the Appellant as well.
47. The victim alluded to the Appellant having talked to her before the act. Having told her that she was beautiful such that he had noticed her as being smart upon admission at the Institute. He also sought to know whether she had seen a man’s ‘thing’ and she denied then he told her that she would see it and he proceeded to place her on the foam.
48. The victim said it happened after students had eaten around 12.00 pm. The Appellant said they served lunch at 12.00pm and at around 12.05pm he left his house such that at 1.00pm when DW3 called he was on his way to hospital. Time given by both prosecution and Appellant was an estimate but what was proved beyond doubt was the fact of the Appellant having been on duty and further having gone to his house and left immediately.
49. There is a contention of what the ‘thing’ used to urinate was. In fact, the prosecution counsel in contradiction of their own case posed the question what the ‘thing’ was as the victim did not clarify what it meant. In her evidence the victim stated thus;
- “ ....he put his thing in my vagina (kitu ya kukojoa). I felt pain. There was some discharge from my anus because he also inserted his thing there.... I slept on the foam facing upwards and he had slept on top of me. I had never slept with any man before.”
50. What she stated was reference to something used to pee or urinate. Therefore, PW1 made reference to an organ used to release urine which can only be a vagina in respect of female and a penis in respect of a male. Therefore, the learned trial Magistrate did not misdirect herself.
51. As to the question of the alibi defence put up, in *Victor Mwendwa Mulinge v Republic* eKLR the Court of Appeal stated as follows;
- “It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution; see *KARANJA v REPUBLIC* [1983] KLR 501.
- The appellant was arrested on 16th May, 2003 and taken to Shauri Moyo Police Station where his statement was recorded. That statement was not produced before the trial court. Had that been done, the court would have been able to consider whether what the appellant had stated at the earliest opportunity regarding his whereabouts on the material day was in line with his defence of alibi before the court. In *KARANJA v REPUBLIC* (Supra), this



Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."

52. The trial court dismissed the entire defence as mere denials after analyzing evidence adduced by both the Appellant and prosecution and reached a finding that the act was committed after the students' lunch, whether it was at 12.00pm or 1.00pm.
53. Notably, when the victim testified the Appellant did not put forward his defence of alibi. Even after he instructed an advocate the purported alibi defence was not put to the victim. Similarly, when the Investigating Officer testified it was not. Evidence on record by the defence show that the Appellant went to hospital thereafter but having been at the Institute as explained by the prosecution, nothing would deter him from doing what the victim stated prior to leaving.
54. In *Mukungu v Republic* [2003] AHRLR 175 (KECA 2003) the Court of Appeal stated that;

"Provided 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 accused if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim was talking the truth."
55. In *Kassim Ali v Republic* [2006] KECA 156 (KLR) the Court of Appeal held that;

"...the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."
56. The trial court in believing the victim reached a finding that the victim not only identified the Appellant but acknowledged him as the perpetrator. Indeed, circumstantial evidence adduced pointed to none other than the Appellant as the perpetrator of the act.
57. On sentence, Section 8(3) of the *Sexual Offences Act* provides thus;

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
58. The Appellant was sentenced to serve 15 years imprisonment. In *Kaingu Elias Kasomo v Republic* [2010] eKLR the Court of Appeal stated that;

"Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim."
59. Ideally, the victim having been 16 years old, the sentence to be imposed would have been a minimum of fifteen (15) years imprisonment. Therefore, this court will not interfere with the sentence.
60. The upshot of the above is that the appeal lacks merit. Accordingly, it is dismissed in its entirety.
61. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF APRIL, 2026.

.....

L.N. MUTENDE

JUDGE

