



REPUBLIC OF KENYA



KENYA LAW
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**Ndungwi v Republic (Criminal Appeal E033 of 2023)
[2026] KEHC 5104 (KLR) (5 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 5104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E033 OF 2023
TM MATHEKA, J
MARCH 5, 2026**

BETWEEN

STEPHEN WAMBUA NDUNGWI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the Judgment, conviction & sentence of
Hon. B. Ireri (SPM) Makindu delivered on 6/4/2023)*

JUDGMENT

1. The Appellant was charged in Makindu Magistrates Criminal Case S.O 34/2019 with defilement Contrary to Section 8 (1) read with Section 8 (4) of the Sexual Offences Act. Particulars were that on September 2018 at Makutano area Kibwezi Sub-County, that he intentionally and unlawfully caused his male organ to namely penis to penetrate the female organ namely the vagina of DMK a girl aged 17 years old. In the alternative count the Accused person was charged with committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

Particulars are that on unknown date in the month of September 2018 at Makutano area Kibwezi intentionally and unlawfully caused his male organ namely the penis to touch the vagina of DMK a child aged 17 years old.

2. He pleaded not guilty on 4/3/2019.
3. Matter proceeded for hearing. 5 witnesses testified as follows;

PW1 DMK testified that in September 2018 when she went to the hospital it was confirmed that she was pregnant. She stated that it was the accused person who was a neighbour responsible for the pregnancy. That he used to give her money and he would have sexual intercourse with her. That one morning as she was going to school the accused person who



had approached her for sex before took her to the bush and he had sexual intercourse with her. The accused told her to remove her panty which she did and he had sexual intercourse with her. The accused gave her Kshs. 50/= and she went to school and she did not inform anybody. That after one month she discovered that she was pregnant. She testified that she had not had sex before she had sex with the accused person. When she went to the hospital she was informed that she was pregnant and she informed her aunt ZM. The matter was reported to the police and the accused person was arrested and charged. She stated that she had sexual intercourse with the accused person in August 2018 and she gave birth in April 2019. PW2 ZM testified that she noticed that she appeared like she was pregnant and upon interrogation her but she denied that she was pregnant. That in January 2018 she took her to Amref Hospital where a scan was done and it was confirmed that she was pregnant and the complainant then informed PW2 that she had been impregnated by the accused person who was her lover since 2018. That PW2 reported the matter to the police as the complainant who was born in 2002 was aged 16 years and the accused person was arrested and charged.

PW1 informed her that she had sex with the accused person in August 2018. That in January 2019 is when it was confirmed in the hospital that the complainant was pregnant.

PW3 Dr. James Mbiu produced the P3 for the complainant as exhibit 2. The P3 form was filed on 26/2/2018, for the complainant who was aged 17 years at the time of examination. It was alleged that she was defiled in August 2018. On examination she was found to be pregnant at 30 weeks, her hymen was broken.

PW3 produced the PRC form as exhibit 3 and the outpatient card as exhibit 4.

PW4 Omar Mwidau a Government Analyst working at the Government Chemist Mombasa produced the DNA report for the samples taken from the accused person, the complainant herein and the child born by the complainant herein one MM. He produced the report as exhibit 5(a) and the exhibit memo form as exhibit 5(b). Upon analysis of the samples, it was conclusive that the accused person is the biological father of the said child MM at the range of 99.9% PW5 was the Investigating Officer one Police Constable Lilian Mwangi who took over the police file on 6/3/2021 as the Investigating officer was transferred. PW5 perused the file and retained the findings of the initial investigating officer. PW5 produced the complainant's birth certificate as exhibit 1 which shows that she was born on 2/2/2002 and therefore she was 17 years old when she was defiled. PW5 positively identified the accused person in Court.

4. In his defence the Accused stated:

I am Stephen Wambua Ndungu. I live at Masongaleni Settlement Scheme I was a Pastor I was at Makutano church. I understand the offence and I wish to state that on 7/3/2019 at 8.00 I was at home when the police officers from Ulilinzi Police Post came and asked my names and asked I accompany them to the police post. They alleged I had defiled a school girl in the bush and I did not commit the offence. The charges are framed the complainant alleged I defiled her at 6.00 am in the morning next to the school. At the place are three roads and there is a church and the church is surrounded by other facilities which are busy and there are houses all over, therefore it is suspected nobody saw me defiling her. Yet the roads are always full of people walking and therefore there is no bush near the school where I am alleged to have defiled her. Even children going to school could have seen me defiling her. At 6.30 am there are pupils going to school at that time. I could not have raped her that morning. She did not report at school I raped her. No pupil was called to testify. I came to



learn later that Zipporah who testified she noticed the complainant was pregnant, she beat the complainant who named me. I had given Zipporah a plot at Makutano and she was to be paying Kshs 5000/= but at some point she had to leave as she owed my wife a lot of money and I assisted her in September 2016. Then she later came and told me I had ashamed her. It took 7 months for them to discover she was pregnant. Your Honour, I was framed on 7/9/2022 a DNA test was ordered Your Honour. The investigating Officer who took me for blood sample colluded with the complainant's people. Officer Katana took me to Kibwezi Police Station and I was placed in the cells... At around 3.00pm Ogira told me since I had not done what he said he would take me for DNA. He took me to Amref where my blood was removed for DNA and I was released. The Investigating Officer Ogira did not visit the scene. He colluded with ZM and framed me. I do not know when the complainant's blood sample was taken, I have been in remand for two years and the in charge remand Prison enrolled me in guiding and counseling and I have been a trainer at the remand prison and I have certificates which I have presented to the court Your Honour I am still committed to my faith. I have a family and children and a wife request the court to acquit me. I was framed. What I have stated is true.

5. On cross examination he told the court

I was in court when all the witnesses testified. I know the area where the incidence is alleged to have occurred. The DNA confirmed I am the biological father of the child who was born by the complainant.

6. On 7/6/2023 – the court sentenced the accused person to 30 years' imprisonment for defilement Contrary Section to 8(1) as read with 8(4) of the Sexual Offences Act.

7. Aggrieved the accused filed this appeal on the following grounds:-

1. That, the learned pundit Magistrate erred in both fact and law when she convicted and sentenced me without observing that the provisions of Section 200 (3) of the C.P.C were not complied with, rendering the trial a nullity.
2. That the trial magistrate erred by failing to observe that the trial was conducted in contravention of Section 19 of the *Oaths and Statutory Declarations Act* concerned with the reception and admissibility of evidence of a child of tender years, and Section 2 of the SOA, as well as presiding over a unfair trial against my constitutional right
3. That the learned trial magistrate erred in both points of law and fact by convicting me without considering that there was no evidence to prove Defilement as required by law especially in a case where material contradictions are prevalent.
4. That the learned trial magistrate erred in both points of law and fact by convicting me without properly applying Section 124 of the *Evidence Act* and dismissed my sworn defence which alleged the possibility of being framed up due to an existing grudge without giving cogent reasons.
5. That the learned trial magistrate erred in both points of law and fact when he sentenced me to serve 30 years imprisonment yet the sentence provided by our current law is limited to 15 years, and failed to observe the law under Section 169 of the CPC by failing to record a judgment as expected of him by the law.

8. He submits that the proceedings in the subordinate court were conducted in contraction of the provisions of Section 200PC – the trial proceeded before Hon. J. O Magori who heard 2 witnesses



- and when Hon. Ireri SPM took over Section 200 Criminal Procedure Code was invoked whereby the defence opted to proceed denovo.
9. The appellant reproduces the proceedings before the Hon. Ireri B when he took over the matter. That 3 witnesses had testified before Hon. Magori, and that Hon Ireri did not comply with Section 200 of Criminal Procedure Code. It is submitted that at 1st instance he ordered that the matter proceeds denovo. However the court changed its mind when the ODPP said they could not trace the 2 witnesses – mother and child.
 10. The court therefore delivered a ruling saying that the matter would proceed and the 2 witnesses would be called if traced.
 11. I have looked at the record. It is true that on 17/5/2022 Section 200 Criminal Procedure Code was complied with and the court stated “It was ordered that the case to start denovo.”
 12. On 7/7/2022 the prosecution indicated they were unable to trace the witnesses and sought that the matter do proceed from where it had reached. That Section 200 of the Criminal Procedure was not automatic that a matter would have to start afresh. Counsel for the accused Mr. Kasyoka stated: -

to be fair to the prosecutions, I will not have a problem proceeding from where we have reached. However can the mother and the complainant be availed for cross- examination they are residents of Kibwezi. I was not on record when they testified.
 13. The court made the following ruling:-

I have looked at the application and I order that the two witnesses shall be recalled subject to their availability and if they cannot be availed the court will proceed to consider their evidence on record.
 14. The matter proceeded for hearing. PW4 & PW5 testified. Someone by the name Joan cross-examined the witnesses. Prosecution closed its case; Appellant was put on his defence.
 15. The argument by the Appellant is that the court stated that the 2 witnesses shall be recalled subject to their availability. He argues that the court did not make a determination as to whether or not the 2 witnesses were available. That the court having bound itself to have the witnesses availed for cross-examination did not enquire neither did the prosecution make any effort to demonstrate to the court the availability or lack thereof of the 2 witnesses. He argues that this was prejudicial to him and violated his right to a fair trial.
 16. He submitted that it was the duty of the prosecution to avail the witnesses/explain their failure to avail the witnesses. That the prosecution intentionally and deliberately refused to avail the witnesses for cross-examination by the defence counsel denying the Appellant the right to representation. The appellant relies on Antony Musee Matinge v R [2012] eKLR.
 17. On the mandatory nature of Section 200 (3) of the Criminal Procedure Code he relies on Ndegwa v R [1985] e KLR 534 where the court stated
 - (i) no rule of natural justice, statutory protection and evidence of common sense should be sacrificed, violated, or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration,
 - (ii) The statutory and time honored formula to the magistrate making judgment should himself see, hear, assesses and gauge the demeanor and credibility of witnesses should always be maintained,



- (iii) A magistrate who did not observe the evidence is not in a position to access the position, credibility and personal demeanor of witnesses.
18. Richard Charo Mbole v R Cr. Appeal No. 135 of 2004 (sic) – that failure to comply with Section 200 of Criminal Procedure Code would render a trial a nullity.
19. It was further submitted that the court did not comply with Section 19 of the Oaths & Statutory Declarations Act on voire Dire. He relies on Section 125 of the Evidence Act. He cites John Otieno Oloo v R [2009] e KLR where the court stated;
- In KIUNE v R CR APPEAL NO. 77 OF 1982, the court said that
- “in any proceeding before any court, where a child of tender years is called as a witness, the court is required to form an opinion on a voire dire examination whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth.”
20. The Appellant relies on Kinyua v R [2002] (sic) (no citation) where he submits the Court of Appeal set out the procedure for admitting the evidence of minors. That the court must determine whether or not the minor understands the nature of an oath; and whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth. That the court held that the evidence of children requires corroboration.
21. He submits that the failure by the court to follow up the 2 step procedure, the court omitted to establish that the child understands the nature of oath, and was intelligent enough to testify. That in the circumstances, the court was unable to ascertain whether the testimony of the complainant was truthful. He submits that this omission is an incurable mistake that vitiates the evidence of the witness and was fatal to the testimony of PW1 and that the only remedy available was for this court to allow the appeal, set aside the conviction and set him free.
22. On whether the prosecution had proved defilement, he started by pointing out the ingredients of the offence. Stated that he had no intention of defiling a child and that the complainant was a big woman capable of making an informed choice. He however dealt with the issue himself by pointing out that he had not raised the defence under Section 8 (5) of the Sexual Offence Act. The Appellant set out the complainant’s testimony thus:-

“Accused gave me some money he is a neighbor. His home is about 15 minutes’ walk from our home. He gave me Kshs. 120/ and 30/= on the way. I used the money for my personal needs. We met on the way one day and he told me to meet him on another day for him to tell me something. We later met while on my way to school in the morning he asked me whether we could have sex. I told him that I was going to school but would answer him later. The following 1 day we met at 6.30 am while on my way to school near our school. He asked me to give him my answer. I told him yes we could have sex. He asked me to remove my clothes. It was a blue blouse and black dress. He asked me to remove my underwear and I removed he laid on top of me. I was facing upwards. We had sex. He used his private part the penis and put it in my vagina. I use the vagina for urinating and the penis is also used for urinating. The accused was in a jacket and trouser. He unzipped his trouser and removed his penis. It took 3 minutes, I went to school and he went away after giving me Ksh 50/- he did not use a condom. He never had sex with me again thereafter. I went to school. I did not inform anyone. I was not threatened. There were people on the road that morning. I woke up late



and other pupils had gone to school. I discovered that I was pregnant after one month. I had gone to Masimbani hospital. I had no boyfriend before I had sex with the accused. I had never had sex before. I started having my periods when I was in class 6. I did not bleed the day I had sex with the accused..... I informed my aunt Zthat I was pregnant. I did not inform her who was responsible. (emphasis by appellant)

23. He submits that from this evidence it is clear that the Complainant agreed to have sex with him. According to the Appellant this was mutual, consensual sex and that this court can apply Section 354 of the Criminal Procedure Code, review the sentence or dismiss the appeal for lack of intention to defile.
24. He submits that PW1 stated that she was in a romantic relationship with the Appellant since 2018. On 26/2/18 she was found 21 weeks' pregnant. He submitted and I quote him

“From the testimony of both the complainant and the appellant’s defence it is evident that this is one of those cases that may fall into the lovers’ category considering the circumstances of the case. Two neighbors who fancied each other and agreed to have sex. Of course the law does not recognize PWI’s consent because she did not have the capacity to consent.

In as far as the ingredients of defilement are concerned, the same were admitted and proved. There was penetration, the complainant was below the age of eighteen (18). However, there is no evidence that the appellant went out of his way to ask the age of the complainant. Hence Section 8(5) and (6) of the Sexual Offences Act would not be applicable.”

25. He submits that the only issue is the sentence which he argues was excessive. He goes on to cite *Dismas Wafula Kilwake v R*, *Francis Karioko Muruatetu v R* and other cases on the unconstitutional nature of minimum mandatory sentences. He urges the court to be guided by Section 33 of the Sexual Offences Act which requires the court to consider the circumstances of the offence in determining whether an offence has been committed; and for the purpose of imposing an appropriate sentence considering the extent of the harm suffered by the person concerned. He submits that this case is an example of the criminalization of adolescence where experts say that sexual hormones are raging and one has the desire to discover and explore one’s self and body. That what happened here was a love affair that was not approved by relatives of the complainant.
26. He submits that the evidence of PW1, and that of PW2 on the dates she had sex with Appellant, the number of time and the date she found she was pregnant is contradictory. He argues;

“The evidence on record clearly shows that by the time the pregnancy examination was done on 26/2/2019, PW1 was 21 weeks pregnant. That means she may have conceived the pregnancy sometimes in October 2018 so as to give birth in April 2019, after the normal pregnancy period of nine months.

PW2 says she suspected PW1 to be pregnant in December 2018 and took her to hospital in January 2019 where the pregnancy was confirmed. She says that PW1 told her they had an affair with the appellant which had started from May 2018 and had sex on several occasions and that they had sex in August 2018. However, PW1 says she became pregnant in September 2018 and gave birth in April 2019 having had sex only once in August 2018. This contradicts because PW1 insists that she had sex only once and conceived the pregnancy. So she could not have had sex in the month of August and again in the month of September.

27. On whether the prosecution proved the age of the Complainant he argued that the evidence of the Complainant that she was 17 years old was not corroborated. He cited cases from the proviso to Section



124 of the Sexual Offences Act. He proceeded to cite *Savali Omare v R*[2017] e KLR which I found to be *Sahal i Oma r vRepublic*[2017] KECA 357 (KLR)

28. He submits the trial court did not set out the law under Section 124 of the *Evidence Act*. Neither did the court conclusively state that the Complainant was telling the truth. Neither did the court state why it believed the Complainant.
29. He submitted that the trial court erred by dismissing his sworn statement of defence. He urged that the provisions of Section 333 (2) of the CPC was not complied with despite its mandatory nature. He cited *Ahamad Abolfathi Mohammed & Another v R* [2018] e KLR. Where the court stated;

“Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to Section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest.

30. Relying on *Dorcas Jemutai Sang v R* (2018] e KLR where the court stated:-

“In the present case we are satisfied that both the courts below appeared to or shifted the burden of proving innocence on the appellant. This we say in the light of the quotations we have reproduced above where the learned trial magistrate stated that the appellant...did not call witness to support her defence,” and the learned Judge remarked that...it was a significant fact that the appellant did not call any witness at the trial. By these sentiments, both the courts below appeared to say that the appellant was obliged to call witnesses to prove her innocence. As stated above, that was a wrong approach regarding the burden of proof in a criminal prosecution and therefore we allow the appeal on this ground.”

He submitted that the trial court was in error when it shifted the burden of proof to him.

31. The State filed its submissions dated 24/6/2024 by Omollo vera State Counsel.
32. The state argued the appeal on the 4 heads age, proof of defilement, the sentence and whether the trial court infringed any provisions of the law.
33. On age it was submitted that the same was proved by way of Certificate of Birth Serial Number 9516072 which proved that Complainant was 17 years at time of offence, Date of Birth 2/2/2002. State relied on *Hilary Nyogesa v Republic* [2010] e KLR on the importance of proving the age of the victim.
34. On proof of defilement the state relied on the evidence on record and the testimony of Complainant that she had sex with appellant then she got pregnant then DNA established that the Appellant was the father of the child. The penetration was proved.



35. On the sentence it was argued that sentencing is at the discretion of the trial court. The State cited *Benard Kimani Gacheru v R* [2002] e KLR cited in *Simon Oduor Oloo v Republic* [2022] e KLR, where it was held:-

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

The court is urged to maintain the sentence.

36. Regard the provisions of law Section 200 (3) of CPC it is submitted that trial court had complied. Section 19 of the Oaths & Statutory Declarations Act it was submitted that the Complainant was not a child of tender years as a child of tender years is between 1 – 10 years old. Section 124 of the [Evidence Act](#) there is no requirement for corroboration where the witness is victim of sexual offence.
37. The Appellant filed supplementary submissions. He submits that we can treat the Complainant as a minor, though she said she was 17 years old. That the reference to her as a “minor” required the court to carry out *voire dire* (*JGK v R* [2015] e KLR. 17 year old was a child. He submits that the DNA was a total frame up. He also cited *Samuel Warui Karimi v R* [2016] e KLR where the Court of Appeal was of the view that “the purpose of undertaking *voire dire* examination in a criminal trial is to protect the guaranteed right of a fair trial” and proceeded to allow the appeal and set the Appellant free...”
38. From the record, the grounds of appeal, the submissions, the issues for determination are:-
1. Whether the initial trial court complied with *voire dire* requirements (Section 19 of Oaths & Statutory Declarations Act).
 2. Whether the 2nd trial magistrate complied with Section 200 (3) of the Criminal Procedure Code upon taking up the matter.
 4. Whether defilement was proved.
 5. Whether accused’s defence was considered/whether the trial court shifted the burden of proof to the Appellant.
 6. Whether the sentence was manifestly harsh to warrant the review of trial court.
 7. Whether the appeal has merit.
39. Was a proper *voire dire* conducted by the initial trial court?
- The record shows that by 5/9/2019, the Complainant had already given birth and a DNA test was applied for under Section 36 of the SOA. The matter proceeded to hearing on 5/11/2019. The record shows that the trial court did not conduct a *voire dire* examination. The record simply shows “PW1 Female Minor, sworn states Kiswahili:”
- I am 17 years old. I was born on 2/2/2002.”



40. Subjecting a child of tender years to *voire dire* examination is set out under Section 125 (1) of *Evidence Act*, and Section 19 (1) of the Oaths & Statutory Declarations Act. In *Samuel Warui Kirimi v R* [2016] e KLR the Court of Appeal held that though a child of tender years is defined by the *Children Act*, as 10 years old that is not the provision in the Oaths & Statutory Declarations Act. That courts have held onto the age of 14 years as the age of tender years and sometime even a higher age but “the age of 14 years remained a reasonable indicative age per the purpose of Section 19 of the Oaths & Statutory Declarations Act Cap 15 Laws of Kenya. Hence DMK who was 17 years old at the time of trial would not fall into the category of a child of tender years.

In the circumstances I find that there was no need to conduct *voire dire* in the case.

41. Was Section 200 (3) of the CPC complied with? The record shows that when Hon. Ireri SPM took over the matter, he did comply with Section 200 (3) where on 17/3/2022 he directed that the case to start *denovo*.

The prosecution sought a review of the order on 7/7/2022 citing the fact that they could not trace the Complainant and her mother.

In the court ruling of 21/7/2022 the court stated:

“...I order that the two witnesses shall be recalled subject to their availability and if they cannot be availed, the court shall proceed to consider their evidence on record.”

42. I have carefully perused the record after that, and nowhere in the record did the court seek the availability of the said witnesses neither did the prosecution report to court on their availability. The court proceeded to hear the rest of the witnesses, and the prosecution to close its case without availing the 2 witnesses for cross examination by the accused or his counsel. Clearly this was prejudicial to the Appellant as he had been granted an order to have the witnesses recalled to be cross examined by his advocate on the evidence they had given against him. Does this vitiate the trial?

The Appellant submits that this violated his right to fair trial as set out on Article 50 of *the Constitution* and vitiates the full trial and this alone should lead this court to allow the appeal against him and set him at liberty accordingly.

I have carefully considered the record. It is clear that the prosecution had indicated the difficulty in obtaining these witnesses and the time they sought review and that the trial court had indicated in the absence of the 2 witnesses it would proceed with the evidence on record.

In the end, even though the prosecution did not avail the 2 for cross-examination and the court did not ask for them, the court proceeded with the evidence on record. Evidently there was inadvertence on the part of the court and the prosecution in not revisiting the issue. However, the appellant was also not an idle participant and since he was represented, he, having been granted the order, had the right to raise the issue at the time that the prosecution was closing its case. As to whether or not this failure on the part of the court and the prosecution vitiated the full trial appears to me to depend on what kind of other evidence was available against the Appellant.

43. Did the prosecution prove the age of the Complainant and defilement? The age of Complainant was established through her testimony, and the Certificate of Birth. Regarding defilement the Appellant’s view was that the evidence of PW1 and that of her mother were inconsistent. That the Complainant said they had sex once in August 2018, yet the mother said that the Complainant told her they had an affair since May 2018. Having sex and having an affair cannot be equated to be the same thing. The accused was a neighbour and a watchman in the neighbouring school and it would appear, he had begun a relationship with the girl in May 2018 and that is why when he asked her sex on that August



day she agreed. In his submissions in this appeal, the Appellant urges the court to find that this was an affair between two lovers, to consider that this was an adolescent with raging hormones and that because the family of the Complainant was opposed, it turned out that way. In his submissions, the Appellant concedes to the sexual encounter. While submissions are not evidence, it indicates that what he seeks is a sentence review on the admission he makes.

44. While inter-generational sexual relationships are not outlawed, any sexual relationship between an adult and a child as defined in our law is outlawed. This is what the appellant and those in his position must bear in mind, at all times.
45. Be that as it may the Complainant gave birth to a child and DNA samples were taken. The evidence by the Government Analyst was that the accused was the biological father of the child. Appellant claimed that the DNA was a frame up. This argument is untenable. There was a clear order of the court that the baby, the Complainant and the Accused's samples be collected for DNA evidence. That was done and the report presented in court. His testimony that the DNA was a frame up suggests that the Government Chemist was involved in a shady deal to frame him. Why him? What is clear is that the DNA placed him with the Complainant in a sexual act, yet she was a minor. He claimed the complainant's mother had a grudge against him. However, they did not come up in cross-examination and appeared to be an afterthought. The Complainant told the court there was no force, she was not threatened. She had sex with the accused in the bush hence unless a person happened to find them, there was no commotion to attract attention of anyone/any passerby. She said she did not tell anyone and it is clear, had it not been for the pregnancy she did not intend to tell anyone. The trial court was right to reject the Appellant's statement of defence.

The complainant's testimony on how the sexual encounter happened has been conceded by the Appellant in his defence that the only mistake was that his sexual partner was below the age of 18 years old.

46. Was the sentence excessive and harsh? Section 33 of the Sexual Offences Act requires that the court considers the circumstances of the offence in determining the impact of the offence and the sentence. In this case the Appellant requested and the complainant agreed to have sex with him. However, the Complainant does not have the legal capacity to consent to sex and in addition the Appellant is not the Complainant's age mate to bring the matter into Romeo-Juliet status. Section 8 (4) provides a minimum sentence of 15 years imprisonment. The trial court awarded a sentence of 30 years imprisonment. In determining the sentence the trial court stated he had considered the offence was serious, had considered the pre-sentence report.
47. I have considered the sentence. It is trite that sentence is at the discretion of the trial court. Nevertheless in a circumstance same as this where there is a minimum mandatory sentence it would only be fair to the accused when the court goes beyond that minimum, the court to give reasons. A sexual offence is serious by its nature. That is why there is a minimum mandatory sentence. The trial court did not state what it was that was in the report that supported the extra 15 years on top of the minimum.
48. In the circumstances, I am of the view that the sentence becomes subject to review as no reasons were given for the advancement.
49. Looking at the current Presentence Report the Appellant is 67 years old. The victim and the family and the community were spoken to by the Probation Officer. It would appear that other than this incident that Appellant was not known in the community to be a person of wayward behavior/conduct with children in the community.



In the circumstances, I would find that the sentence is reviewable to the sentence to the mandatory minimum provided by Section 8 (4) of the Sexual offences Act.

49. In the circumstances, I find that the conviction was sound. The Conviction is upheld
50. The sentence of 30 years is set aside and substituted with the minimum mandatory sentence of 15 years imprisonment.

Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH MARCH 2026 MUMBUA T
MATHEKA**

Judge.

SIGNED BY/FOR:

LADY JUSTICE MATHEKA, TERESIA MUMBUA

TH E JUDICIAR Y O F KENYA

LADY JUSTICE MATHEKA, TERESIA MUMBUA

