



**Mwembi v Republic (Criminal Appeal E029 of 2025)
[2026] KEHC 5930 (KLR) (4 May 2026) (Judgment)**

Neutral citation: [2026] KEHC 5930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E029 OF 2025**

SM GITHINJI, J

MAY 4, 2026

BETWEEN

BARNABAS MWEMBI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein, Barnabas Mwembi was charged in the Lower Court within a main Court of defilement, contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#), No. 3 of 2006.
2. The particulars of this offence are that on the 4th day of March, 2024 at [particulars withheld] Village in Tigania Central Sub-County within Meru County, the Appellant intentionally caused his penis to penetrate the vagina of N.K a girl aged 12 years.
3. In the alternative, he faced a charge of committing an indecent act with a child, contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
4. The prosecution case is that the victim herein (N.K), was born on 28th August, 2012. Her mother, the PW-5 in this case stated so in her evidence and produced her copy of Birth Certificate No. 6164583 showing she was born on the said date.
5. On 4/3/2024 the victim had been left by her mother with PW-3 who's her grandmother. The grandmother went to the farm leaving N.K at home. At about 5.00 Pm PW-2 an Aunt to the victim sent her together with her Cousins namely Dennis, Kevin and Mboni to go and fetch firewood. They went.
6. The Appellant herein who's their neighbour and used to visit PW-3's house and served with tea, went to where the children were. He called on N.K and told her to accompany him to his house to be given



- bananas for them to eat. She did so. When they got to the house he opened the door. The girl waited outside to be given bananas. However the Appellant held her by hand and pulled her into the house.
7. Inside the house he removed her clothes and placed her on bed. He removed her underwear and threw it on the floor. He then removed his black trouser and a green shirt. The victim realized what he was up to and tried to scream. She managed to scream once, after which he took a cloth and used it to gag her, by covering her mouth. He laid her on her back and using his penis, penetrated her vagina, of which she described as having done to her “tabia mbaya”; further “Alinirape”.
 8. Her Cousins had heard her scream. They went outside the house door of the Appellant. The victim heard Dennis asking, “Isn’t Kendi coming with bananas?” They then all wondered loudly whether something evil was being done to her. They went and called PW-2.
 9. PW-2 went to Appellant’s house. She knocked on the door. The Appellant abused her, asking who she was to get to her house. When she got inside, she found the Appellant wearing his trouser. The victim was naked inside the house. Her under pant was on the floor. She picked the clothes and together with the victim and PW-3, went and reported the matter at Mulika Police Station.
 10. PW-6, received the report. They called the victim’s mother, PW-5 in this case. The Officer’s visited the suspect’s house. The Appellant was found inside the house asleep, drunk. He was arrested and taken to Mulika Police Station.
 11. PW-1 was examined at Mikinduri Sub-County hospital where her PRC and P-3 forms were filled by PW-4. The Clinical Officer noted that she was in fair general condition. However labia minora was reddish and hymen was freshly torn. Lab tests were negative. The Office made the opinion that she had sexual intercourse for the first time and was therefore sexually assaulted.
 12. After completion of investigations, the Appellant was charged with the offences carried in the charge sheet.
 13. The Appellant gave sworn evidence in his defence and called no witness. His defence is that he comes from [particulars withheld] and he is a farmer. He alleged the charges were false. He alleged that (PW-3) Agnes Gacheke is married to his brother. She started selling land and had not divided it to her children. The accused warned her against it. She threatened him, telling him that he’ll “face it.” That is why they brought up the charges against him. The witnesses are related to her. His brother is deceased and if he had committed the offence he would have gone underground.
 14. The trial Court evaluated the evidence and found the Appellant guilty of the offence in the main Count. He was convicted of the same and sentenced to life imprisonment.
 15. The Appellant dissatisfied with the said conviction and sentence, appealed to this Court on the grounds:-
 1. That, the indeterminate life sentence imposed is unconstitutional and inconsistent with the rights of the Appellant as stipulated under Articles 28 and 29(f) of *the Constitution*.
 2. That, the Learned Trial Magistrate misdirected himself in matters of law and fact by failing to notice that the charge sheet as amended was defective hence the Appellant was not properly charged with the correct section of the law.
 3. That, the Learned Trial Magistrate misdirected himself in matters of law and fact by failing to notice that according to the birth certificate the Appellant should have been sentenced under the provisions of Section 8(3) of the *Sexual Offences Act* No. 3 of 2006.



4. That, the Learned trial Magistrate misdirected himself in matters of law and fact by failing to notice that the allegations against the Appellant were motivated by a long standing family grudge.
16. The Respondent opposed the Appeal, and the same was canvassed by way of Written Submissions. Both parties filed their respective submissions.
17. In this Appeal, allegedly involving the offence of defilement of a victim aged 11 years, the Appellate Court is principally concerned with whether the prosecution proved the essential ingredients of the offence beyond reasonable doubt, as required under Section 8 of the Sexual Offences Act No. 3 of 2006.
18. These ingredients are:-
 1. Proof of age of the complainant who must be a minor, that is, a child below 18 years; and specifically for purposes of sentence, 11 years old or below.
 2. Proof of penetration, which is partial or complete insertion of genital organs into genital organs as defined under Section 2 of the Act.
 3. Proper Identification or recognition of the perpetrator.
19. On the first issue a copy of the Birth Certificate in respect of the victim was produced as an exhibit. It is No. 6164583. It shows vividly and firmly that she was born on 28th August, 2012. The offence allegedly took place on 4th March, 2024. By simple calculation, the victim would have celebrated her 12th year Birthday on 28th August, 2024. On 4th of March, 2024 she was therefore 11 years old.
20. There is therefore no doubt that the victim was 11 years old by the time of the said offence. Before one attains the next year in age, for the purpose of Sexual Offences Act, they are held to be of the previous complete year age. The months in – between are not weighed. In this case the trial Court was right in holding that the victim was 11 years old as of the time of the alleged offence. The error in the charge sheet, where the age was indicated as 12 years, is curable under Section 382 of the CPC as it has not occasioned a failure of Justice. This also applies to subsection relied on, which’s (3) instead of (2).
21. On the second issue of penetration, PW-2 was clear that the Appellant tricked her to get to her house alone, separating her from her Cousins. He told her to go for Bananas from his house which they could eat. When she arrived, there were no such bananas. He pulled her into the house, undressed her, laid her on the bed on her back, undressed and then inserted his genital organs into hers. The Clinical Officer’s evidence reveals that she had been penetrated. Her labia Minora was reddish and hymen freshly broken. The evidence on penetration is therefore well corroborated by the evidence of PW-4. I find existence of cogent and highly reliable evidence in support of the fact that there was penetration.
22. The 3rd ingredient is of recognition of the perpetrator. The victim was firm and consistent in her evidence that she know the Appellant as a regular visitor to PW-3 where he used to take tea. He was also found almost “red-handed” by PW-3 who appeared at the scene immediately after the incident. He was found dressing up while the girl was still naked, inside his house. PW-2 is a relative and a neighbour who knew him well. The evidence is doubtless that he’s the real victim.
23. The defence is shallow, and an afterthought. He did not cross-examine the witnesses on it. Given the weighty prosecution case, the defence is doubtlessly untrue and a cooked up story by someone desperately out to exonerate himself from an offence well established as having been committed by him.
24. The trial Court was soundly in order when it dismissed his defence.



25. The law is clear that when the victim is 11 years or less, the sentence upon conviction is life imprisonment. That's the sentence meted against the Appellant for the offence, and is well within the law. For as long as Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006 remains as it's, unamended, a person convicted under it can only be sentenced to life imprisonment.

26. The Appeal therefore lacks merit and is hereby dismissed.

DATED AND DELIVERED AT MERU THIS 4TH DAY OF MAY, 2026.

S.M. GITHINJI – JUDGE

4/5/2026

In the presence of:-

Wakwoli for State

Appellant – Present (Meru G. K. Prison)

