REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CRIMINAL APPEAL CASE NO. E048 OF 2025

WAMUSI JOHN PAUL.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant **WAMUSI JOHN PAUL** has filed this appeal challenging his conviction and sentence by the Magistrates Court in Othaya.
2. The Appellant was arraigned in court on **20th August 2024** facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8 (3) OF THE SEXUAL OFFENCES ACT 2006**. The facts of the case were that:-

   "On the night of 18th and 19th day of August 2024 at Gathumbi area in Nyeri South Sub-County intentionally caused his penis to penetrate the vagina of K. M. M a child aged 14 (fourteen) years."

3. The Appellant faced an alternative charge of **COMMITTING AN**

INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT 2006.

4. The appellant entered a plea of '**Not Guilty'** to both charges and his trial commenced in the Lower Court on **14th October 2024**. The prosecution called a total of five (5) witnesses in support of their case.
5. **PW1 M. W. M** was the complainant's mother. She testified that on **18th August 2024** at 3.00pm she left church with her two daughters '**K M M'** and '**F'**. They went home and took lunch. After lunch **PW1** went to attend to her business in Kairuthi. She returned home at 8.30pm and found her husband and '**F'** at home taking supper. **KMM** was not at home. **PW1** searched for her daughter that whole night but failed to trace her.
6. The following day at 6.00am **PW1** and her husband continued to search for their child. They met the appellant and asked him to open his phone. They noted that the appellant had dialed the complainant's phone number. The appellant stated that it was another boy who had used his phone to dial the complainant's number. Upon being searched the parents of

the complainant recovered on the appellants person their daughters mobile phone. The appellant claimed that he was given the home by the shamba boy of a neighbour called Mrs. Njuki. **PW1** went to the home of Mrs. Njuki and collected her shamba boy. Both men were taken to the police station as suspects.

7. At the police station the appellant revealed that he had locked the

   complainant inside an abandoned house close to where he worked. **PW1** phoned the appellants employer and asked him to check the abandoned house. The complainant was found inside the house.

8. **PW1** went to the scene and found the complainant who broke down in tears and reported that the appellant had defiled her. The child refused to go home as she had been having disputes with her father. Instead the complainant was taken to her grand-mother's house. The appellant was taken to the police station and he was later charged.

9. **PW2 K M M** was the complainant. She told the court that she was **fourteen (14) years** old and was a form one student at

Gathugururu Secondary School. The complainant told the court that on **18th August 2024** she was at home. At around 7:00pm the complainant says she received a phone call from a person called '**Paul'** whom she did not know. The man told her that he was at their gate. The complainant went to the gate where she met the Appellant. He told the child to accompany him and led her to his employer's compound.

10. The Appellant then took the complainant to his room and told her to wait while he milked the cows. The appellant then returned and proceeded to defile the complainant.

11. At 4.00am the appellant woke up to go and milk the cows again. He led the complainant to an abandoned nearby and left her in that house. Some days later the appellants employer came to the abandoned house and found the child there. He called the complainants mother who came and rescued the child.

12. **PW3 THOMAS MWANGI** is a clinical officer who at the time was

attached to Othaya Level 4 Hospital. **PW3** produced the complainants P3 form as well as the PRC form **Pexb 1** and **Pexb 2**.

13. **PW4 CHARLES GICHUKI MWANGI** told the court that he was a

farmer residing in Gathumbi and that the appellant worked for him as a farm hand. That on **18th August 2024** he received a call from one '**MWM'** the mother of the complainant enquiring about her daughter '**KMM'** who was missing from home. The mother told **PW4** that her daughter had been spotted with his farmhand.

14. **PW4** went to the appellant's room and found the appellant there

alone. The next morning the mother phoned **PW4** again and requested him to check in a nearby abandoned house as the child was still missing. **PW4** obliged and went to the nearby abandoned house. Inside he found the complainant. **PW4** then alerted the child's mother who then came to collect her. Later **PW4** went to Kairuthi Police Station and found his

farmhand there under arrest. The appellant was later charged.

15. **PW5 PC MUTUA WAMBUA** was the investigating officer. He produced as an exhibit the complainants Birth Certificate **Pexb 1** as well as a blood-stained cream panty which had been recovered on the complainant at the time of her medical examination **Pexb 4**. **PW5** also stated that he went and searched the room which the appellant had been given by his employer where he also recovered a black/white panty **Pexb 4(b)** which the complainant also identified as hers.

16. At the close of the Prosecution case the appellant was found to have a case to answer and was placed on his defence. The appellant elected to give a sworn defence in which he denied having lured the complainant to his house and denied having defiled the child.

17. On **1st September 2025 HON. N. W. WANJA**, **Resident**

Magistrate delivered judgment in which she convicted the appellant.

18. Following his conviction the appellant was granted an opportunity to

mitigate. Thereafter he was sentenced to serve **twenty (20)**

years imprisonment. In his Amended grounds of Appeal which were not dated the appellant based his appeal on the following;-

> **"1. <u>THAT</u>, the learned trial Magistrate erred in law and in fact by conducting the trial in a manner that violated the Appellant's right to a fair hearing, by failing to adequately inform the Appellant of his right to legal representation and by proceeding with the trial without providing or facilitating legal representation where the interests of justice so required, contrary to Articles 25(c), 50(2) (b), (c), (g) and (h) of the Constitution of**

Kenya, 2010, thereby rendering the entire trial unfair, unconstitutional and a nullity.

2. **<u>THAT</u>, the learned trial magistrate erred in law but failed to note that, the ingredients of the charge of defilement were not proved to the required standards of the law."**

<u>ANALYSIS AND DETERMINATION</u>

19. I have carefully considered the appeal before this court, the record of the trial before the Lower Court as well as the written submissions filed by both parties.

20. This is a first appeal in which the duty of the Court is to re-examine and re-analyse the evidence adduced before the lower court and to draw its own conclusions on the same. In the case of **OKENO -VS- REPUBLIC [1972] EA 32** the court set out the duties of the appellate court as follows:-

"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

Republic (1957) EA 336 and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to support the lower court's finding 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] EA 424." (See also Kiilu & Another v Republic [2005] KLR 174).*

21. Similarly in the case of **DAVID NJUGUNA WAIRIMU -vs- REPUBLIC [2010] eKLR** the Court of Appeal stated as follows:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

22. One of the grounds of appeal cited by the Appellant was the failure by the trial court to comply with his fair trial rights as guaranteed by **Article 25 (c)** of the **Constitution of Kenya 2010**. The appellant also alleged that the trial court had violated the rights guaranteed to him by **Article 50 (2) (b) (g) and (h)** of the same constitution.

23. The said provisions of the constitution provide as follows;-

> **"(2) Every accused person has the right to a fair trial which includes the right –**
>
> **(a) .....**
>
> **(b) to be informed of the charges, with sufficient detail to answer it.**
>
> **(g) to choose and be represented by an advocate, and to be informed of this right promptly.**
>
> **(h) to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result and to be informed of this right promptly.**

24. Regarding **Article 50 (2) (b)** I note from the record that the charge and particulars thereof were read out to the accused on **20th August 2024** when he first appeared in court. The charges were read out to the appellant in Kiswahili a language which the appellant confirmed to the court that he understood. Indeed the appellant responded by denying the charges. I am satisfied that **Article 50(2) (b)** was properly

complied with in this case and I dismiss this ground of the appeal.

25. I have carefully perused the record of the proceedings before the lower court. At no time did the trial court either inform the appellant of his right to have legal representation of his choice nor was the appellant informed of the right to have an advocate assigned to him by the state. Does this omission render the entire trial a nullity?

26. **Article 50(2) (h)** contains a rider that the trial may be rendered a nullity only if '**substantial injustice'** is found to have resulted from that omission. I have carefully perused the record before the Lower Court. The Appellant participated actively in the proceedings before the trial court and he robustly cross-examined all the prosecution witnesses. The appellant mounted a vigorous defence to the charge.

27. In the case **Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & another; Office of the Director of Public Prosecutions & another (Interested Parties) [2021] EKLR M.**

Hon Justice Mrima stated as follows:-

28. Having said so, the inevitable question that now follows is: What is the effect of the derogation of the right under Article 50(2) (g) of the Constitution in the circumstances of this case?

35. There are two schools of thought on the issue. The first school fronts the position that once the derogation of the right is confirmed then the entire proceedings, judgment and sentence before the trial court are vitiated and stand null and void ab initio. The other school fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.

36. In answering the question, I will consider the wording of the Article 50(2) (g) and (h) of the Constitution. From the wording of Article 50(2) (h) the right therein is not absolute as he court must first

satisfy itself that substantial injustice may result before it enforces the right. However, that is not the position under Article 50(2) (g) where the right is not qualified. Since that is what the People of Kenya wanted and so settled it in the constitution then it remains the unwavering duty of this Court to enforce the provisions of the Constitution.

29. In **Republic v Karisa Chengo & 2 Others [2017] eKLR**, cited by the appellant, the **Supreme Court** considered the issue of legal representation at state expense and stated inter alia that:

> **"the right to legal representation at state expense, under the said Article, was a fundamental ingredient of the right to a fair trial and was to be enjoyed pursuant to the constitutional edict without more. <u>However, in accordance with the language of the Constitution, this particular right was not open ended but only became</u> <u>available "if substantial</u>**

injustice would otherwise result.” [Own emphasis]

30. From my perusal of the record, I am satisfied that the appellant fully comprehended the nature and severity of the charges which he faced as evidenced by his active participation in the trial. The Appellant mounted an impressive defence. There is no indication that the failure to comply with **Article 50(2)** resulted in substantial injustice to the appellant. I therefore dismiss this ground of the appeal.

31. The Appellant faced in the lower court a charge of Defilement. In the

case of **CHARLES WAMUKOYA KARANI -vs- REPUBLIC [2013] eKLR** the Court set out the critical ingredients of a charge of Defilement as follows:-

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

32. The age of the victim is a critical factor in a charge of defilement as

the law provides for the sentence to imposed (if convicted) based on the child's age.

33. **Rule 4** of the **Sexual Offences Rules** state that

> **"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."**

34. In the case of **FRANCIS OMURONI -VS- UGANDA, Criminal**

Appeal No. 2 of 2000, the **Court of Appeal of Uganda** stated as follows:-

> **"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 evidence. Apart from medical evidence age may also be proved by birth**

certificate, the victim's parents or guardian and by observation and commonsense……."

35. Similarly in **EDWIN NYAMBOGO ONSONGO -VS- REPUBLIC**

[2016] eKLR the Court stated thus

"……the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and valuable." [Own emphasis]

36. In this case the complainant told the court that she was aged fourteen

(14) years old and was a Form 1 student. **PW1** who was the

child's mother told the court that her daughter was born on **19th October 2009**. She produced as an exhibit the original copy of the complainant's birth certificate **Pexb 3**.

37. The birth certificate Serial number **0203624** confirms that the

complainant was born on **19th October 2009** at PGH - Nyeri. This is an official document which has not been challenged nor controverted by the Appellant and which I find provides indisputable proof of the age of the complainant. I therefore find that it has been proved that the complainant was aged **fourteen (14) years** when the incident occurred.

38. Having proved the age of the complainant the prosecution is required

to prove the fact that penetration had occurred. **Section 2(1)** of

the **Sexual Offences Act 2003** defines penetration as follows:-

“The partial or complete insertion of the genital organs of a person into the genital organs of another person.”

39. In her evidence the complainant stated that the appellant defiled her. She told the court that the appellant lured her to the room which he occupied in his employers compound. In narrating the incident the complainant in her own words stated as follows:-

“He then took me to where he lived at his employer’s home and broke into the house to get the keys and then opened the house. I then sat on his bed and he locked me inside thereafter went to milk the cows. He then asked me if I would eat and I stated I was okay. He asked me to sleep and stated I was okay as I didn’t feel like sleeping. He removed the shirt he had worn and was left with a vest. He also removed my trouser and pantie and penetrated my vagina using his penis ……. The penetration caused pain in my vagina as I had not had sex before. At this

time I tried to scream but accused held my mouth with his hands and we had sex once this night. Accused tried to have sex with me for a second time but I refused. During the penetration accused touched my breasts and kissed me.

At around 4am the accused told me it was time to milk and for me to wear my shoes which I did and went with him through the napier grass to another abandoned house different from the first one he had locked me in earlier and locked me inside."

40. The complainant has given a very detailed and vivid account of what happened to her. It is unlikely that this was a fabricated story.

41. The evidence of the complainant regarding penetration was duly

corroborated by the medical evidence. **PW3** who was a clinical officer attached to Othaya Level 4 Hospital confirmed that the complainant was brought to their facility for examination. He produced the P3 form dated **20th August**

2024 (**Pexb 2**). Upon examination the complainant presented wearing a blood-stained cream panty which item of clothing was also produced in court as an exhibit **Pexb 4**. The doctor who examined the complainant also noted that she had a freshly broken hymen and had lacerations on the vaginal wall. There was discharge of blood from the vaginal wall and blood stains around the vulva.

42. These medical findings were confirmed by the PRC form **Pexb 1** which also indicated a freshly broken hymen and lacerations and bleeding on the vaginal wall. The medical evidence provides clear proof of interference with the genital organs of the child. This is expert medical evidence which has not been challenged or controverted by the Accused. This evidence corroborates the complainants evidence and proves that indeed penetration did occur.

43. I note that in the P3 form it is indicated that there was no evidence of spermatozoa in the vagina of the complainant. In a case of defilement/rape it is not necessary that the sexual act be completed. Any slight penetration amounts to

penetration. In any event use of a condom would also exclude presence of spermatozoa in the vagina.

44. The final element of a charge of defilement which requires proof is the identity of the perpetrator. Was sufficient evidence adduced to identify the appellant as the perpetrator of the offence.

45. The complainant told the court that she received a call from one '**Paul'** and he called her to come to the gate. The complainant went to the gate and met the appellant who told her to cover her head with her hoodie and to follow him to his house. The complainant complied. The two then spent the night together, and the appellant defiled her.

46. From the evidence the complainant met the appellant at her gate at 7:00pm - it was evening and was probably dark. However the complainant accompanied the appellant to his house where there were lights. At no time did the complainant lose sight of the appellant. She was in his company throughout.

47. Whilst at the house the complainant was able to see and identify the appellant as there were lights in that house. In her evidence the complainant states as follows:-

> **"……At this time there were electric lights outside the house but he had switched off the lights inside the house. When the said Paul had left me inside his house to go and milk, he had left the lights switched on but when he returned he switched on then off. I was able to see the said Paul who is the accused clearly as there was no one else in the room. I was able to see accused clearly as he penetrated my vagina as security lights outside permeated through the house which was a wooden house with spaces…."**

48. From this it is clear that there was sufficient light to enable the child see and identify the appellant. The two were in the room alone. There was nobody else in the room with them. Moreover the complainant spent several days in the company of the appellant. The day after the defilement the appellant led the child to an abandoned house nearby. This

was during the day time. Undoubtedly during the daylight she was able to see the appellant very well.

49. **PW1** the complainant's mother told the court that she informed police that she had seen calls to her daughter's phone from a certain '**Paul'**. The police apprehended the appellant. The appellant then revealed to police that the complainant was in an abandoned house. **PW4** the appellant's employer confirmed that he went and checked the abandoned house near his compound and found the child inside. **PW4** alerted the parents of the complainant and the mother then came and collected her daughter.

50. How did the appellant know where the complainant was? The only way the appellant would have known where the child was is because it was he who took her to this abandoned house probably to prevent his employer finding the child in his own house. This evidence relating to the rescue of the complainant provides corroboration of her identification of the appellant.

51. The court is mindful of the fact that the complainant was only witness who identified the appellant. The court is

mindful of the dangers of relying on the evidence of a single identifying witness.

52. **Section 124** of the **Evidence Act Cap 80 Laws of Kenya** provides as follows:-

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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.”

53. The above position was affirmed in the case of **J.W.A VS Republic (2014) eKLR**, where the Court of Appeal held that:

> **“We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.”**

54. Therefore **Section 124** empowers a court in Sexual offences to convict an accused on the basis of the evidence of the complainant alone. Undoubtedly this is because sexual offences are normally committed in secret - there is very rarely an eyewitness to a rape

or defilement.

55. The Appellant gave a sworn defence in which he denied having defiled the complainant. The appellant denied that he was in the company of the complainant on the date and time in question. He states that on **18th August 2024** at 7:00pm he was in his employer's compound. That after bathing he went to his employer's house to watch TV until 8:50 pm when he went to milk the cows and then went to sleep.

56. By this defence the appellant is relying on an alibi defence. The appellant did not raise this alibi at the early stages of the trial as required. In any event the fact that the appellant was watching TV with his employer until 8:50pm does not mean he could not have committed this offence. The complainant stated that the appellant left her in his room and went to his employer's house. That he returned later and defiled her. Obviously the appellant performed his work duties and then came later to join the complainant in his room. Thus this is not a real alibi defence as it does not exclude the presence of the appellant from the location where the defilement occurred.

57. Further the appellant denies that he knew the complainant or had any telephone contact with the complainant. He states that he had left his phone with a friend called '**Felix'** and it is this '**Felix'** who used his phone to call the child. Not surprisingly the appellant did not call this '**Felix'** as a witness. Further the complainant was quite categorical that it was '**Paul'** who phoned her. She did not mention '**Felix'**.

58. I do agree with the trial magistrate that the defence raised by the appellant was an afterthought. The defence did not cast any doubt on the prosecution case.

59. Finally I note that in the judgment at **Page 29** line 12 the trial magistrate stated that

> **"In light of the above section by the law and guided by the above decision, I believe the complainant victim PW2 was telling the truth of what transpired. She narrated her account of what transpired with …… and remained steadfast even on cross-examination."**

60. This was the observation of the magistrate who saw and heard the complainant testify. I have no reason to deviate from this finding on the complainant's demeanor.

61. In conclusion I am satisfied that the charge against the appellant

was proved beyond reasonable doubt. The conviction of the appellant on the charge of Defilement is therefore confirmed.

62. After sentence the appellant was accorded an opportunity to mitigate. A pre-sentence report was also filed in court. The trial court delivered her sentence ruling on **1st Septembers 2024** in which the appellant was sentenced to serve **twenty (20) years** imprisonment and the sentence was to run from **19th August 2024** the date of the appellant's arrest.

63. **Section 8(3)** of the **Sexual Offences Act** provides that:-

> **"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."**

64. The complainant was **fourteen (14) years** old at the time she was defiled. **Section 8(3)** provides for a mandatory minimum sentence. In the case of **REPUBLIC -VS- JOSHUA GICHUKI MWANGI [2023] eKLR**, the Supreme Court of Kenya upheld the constitutionality of mandatory minimum sentences for Sexual Offences. Accordingly I find that the sentence imposed upon the appellant was lawful.

65. Finally I find no merit in this appeal. The same is hereby dismissed in its entirety. The conviction of the appellant is confirmed and his sentence is upheld.

Dated in Nyeri this 8th day of May 2026

.....
MAUREEN A. ODERO
JUDGE