



**Mbuthia v Republic (Criminal Appeal 240 of 2018)  
[2025] KECA 16 (KLR) (10 January 2025) (Judgment)**

Neutral citation: [2025] KECA 16 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 240 OF 2018  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JANUARY 10, 2025**

**BETWEEN**

**DENNIS MWANGI MBUTHIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement of the High Court of Kenya at Migori (Mrima, J.) dated 24th May, 2018 in HCCRA No. 20 of 2017))*

**JUDGMENT**

1. The appellant, DMM, was arraigned before the Principal’s Magistrate’s Court at Kehancha in Criminal Case No. 177 of 2016 charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were, that on the 14<sup>th</sup> day of March, 2016 in Kuria West Sub-County within Migori County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of GCB, a child aged 8 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.
2. The appellant denied the charge and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to serve life imprisonment.
3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.
4. The High Court (Mrima, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 24<sup>th</sup> May, 2018.



5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised six (6) grounds in his Memorandum of Appeal, which are that:
  1. The learned judge of the High Court failed to evaluate the evidence.
  2. The learned judge of the High Court confirmed the appellant's conviction which was based on inadmissible evidence and an evidence of identification which was not positive.
  3. The learned judge of the High Court confirmed the appellant's conviction when the prosecution did not prove the offence of defilement as required by law.
  4. The learned judge of the High Court confirmed the appellant's conviction when the prosecution failed to call essential witnesses.
  5. The learned judge of the High Court confirmed the appellant's conviction when the appellant's rights of fair hearing were violated during the trial, under Article 50 of the Constitution.
  6. The learned judge of the High Court confirmed the appellant's conviction when the sentence imposed is not in conformity with the Constitution.
6. A summary of the evidence that emerged at the trial through six (6) prosecution witnesses, which was subjected to a fresh review and scrutiny by the High Court, is as follows.
7. At the material time of the incident, GCB, the survivor of the charged sexual assault, was eight (8) years old and a class one pupil at [Particulars Withheld] She testified as PW1. After voir doire, the trial court concluded that she did not know meaning of an oath, however, she was intelligent enough to give evidence. Therefore, she gave an unsworn statement. She testified that on the morning of 14<sup>th</sup> March, 2016, she was walking to school when she met the appellant who was being ferried on a motor cycle. The appellant was familiar to her as she had seen him at the P.A.G in her school. The appellant stopped the motor cycle and offered her a ride to school. She accepted the offer and got onto the motor cycle. However, instead of taking her to school as promised, the appellant took her to his house which had no bed, but only sacks and clothes on the floor. He made her lie on the sacks, then asked her to remove her panties. Meanwhile, he removed his trousers and went on top of her. In the words of PW1: "The appellant used the thing he uses to urinate and inserted it in her private parts. She felt a lot of pain and bled. When he finished, he chased her away and told her not to return as he was going to relocate".
8. The complainant went to school and said nothing to anyone. At the time, she was still bleeding. Later, she went home and told her mother who took her back to school to make inquiries. Afterwards, she was taken to hospital and the matter was reported to the police.
9. JC, the complainant's mother, testified as PW2. Her narrative was that when PW1 returned home from school on the material day, she noted that she was limping and walking with her legs apart. She asked her what happened and PW1's response was that she had fallen. Unconvinced by her response, PW2 decided to inspect her. She noted that her vagina was soaked with blood. Thereafter, she went to school with PW1 in tow, to make inquiries. PW1's teacher informed her that PW1 arrived at the school at around 8.30am, crying and said that she was in pain; and the whole time she was in school, she slept on her desk.
10. She then took PW1 to hospital whereby she was examined. The clinical officer who examined her informed PW2 that PW1 told her that two men on a motor cycle carried her and took her to a house. At the house, one of the men defiled her; whereas the other one left them behind. PW2 further testified that afterwards, PW1 took them to the house where the incident happened.



11. PW3 was JCM, the complainant's father. He testified that PW2 went to his place of work in the afternoon of the material day and informed him that their daughter had been defiled. She accompanied PW2 and the complainant to Isebania Police Station and reported the matter. PW1 led them and the police to a certain house in [Particulars Withheld]. Upon arrival, there was no one inside the house. However, a child who was outside playing offered to take them to the owner of the house, one Benard Murithi (PW5). The complainant confirmed that PW5 was not the person who had assaulted her earlier but that the assault had happened in the house. PW5 told them that he used to share his house with the appellant. Later that evening, PW3 got information that the appellant was in a video hall and was able to lure him to his arrest by members of the public. The appellant was escorted to the police station. The next morning, PW1 identified the appellant as the person who defiled her.
12. BM, PW5, testified that on the material day, he was at Wombo Hospital and got discharged later that afternoon. Afterwards at 3.00pm. he went to his shop and found PW3 and PW1. He told the court that he gave them the details about the appellant with whom he used to share a house, who, it turned out, was the person who had defiled the child in the house.
13. PW4, David Ondieki, a clinical officer at Isebania Sub-County Hospital, attended to PW1 on 15<sup>th</sup> March, 2016, when she was taken to hospital. He however testified that PW1 was initially attended to on 14<sup>th</sup> March, 2016, by his colleague, Joyce. The result of the first examination showed that PW1 was defiled as her labia majora had a tear wound which extended to her clitoris; the hymen was broken and the vagina was bleeding. Her urine had blood and a high vaginal swab showed the presence of blood cells. The following day, PW4 reviewed PW1's condition and confirmed the observations that had been made by his colleague. He also testified that when PW1 was taken to the hospital, she had difficulties walking.
14. PW6, PC Edwin Cherutich, was the investigating officer in the case. He gave formal testimony about the report made and his investigations leading to the arrest and charging of the appellant. He confirmed the narrative conveyed by PW1, PW3, PW4 and PW5. He also testified that he knew the appellant, who was once a barber and had shaved him on several occasions. He further told the court that he recovered a nylon sack (polythene) and an old leather jacket from the crime scene. In addition, PW3 gave him PW1's stained under pants; all of which he produced as exhibits before the trial court. Lastly, he also produced PW1's Health and Nutrition card which showed that she was born on 5<sup>th</sup> February, 2008.
15. The appellant gave sworn evidence in his defense, denying the defilement charges. He stated he was a heavy commercial vehicle driver and detailed his movements on 13<sup>th</sup> and 14<sup>th</sup> March, 2016. He claimed he travelled to Isebania arriving on the 14<sup>th</sup> of March in the morning. He handled vehicle repairs, and visited various places, including bars and a movie store. While watching a movie, he was approached by individuals, who included PW3, who interrogated him about his movements, assaulted him, and robbed him of his money, phone, and shoes. He managed to escape and sought help at the Isebania Police Station, only to be accused by three men who arrived there in a motor cycle of defiling a child. The appellant asserted he was framed, had no knowledge of the victim, and only saw her in court. Additionally, he denied working as a barber or shaving PW6.
16. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. Ayodo held brief for Mr. Ketoo for the respondent. Both parties relied on their submissions and opted not to orally highlight them.
17. First, the appellant contended that the first appellate court did not re-evaluate and analyze the evidence a fresh, and make its own conclusion as required.



18. On identification, the appellant challenged evidence presented by PW1, arguing it was unreliable and inconsistent. Initially, PW1 told a clinical officer after the alleged incident that her assailant was unknown to her. However, during her testimony in court, she claimed to have known the appellant prior to the incident. The appellant contended this discrepancy undermined her credibility, citing case law emphasizing the importance of an early and accurate description of an attacker to avoid mistaken identification.
19. The appellant argued that PW1's failure to name or describe her attacker immediately after the incident created doubt about her ability to identify him. He further asserted that recognition evidence should be rigorously scrutinized, as even genuine recognition can be mistaken. He also questioned the reliability of PW6's testimony, claiming that the investigation diary was not produced as evidence, rendering the claim that PW1 identified her assailant as known to her inadmissible. The appellant alleged his arrest was based on circumstantial information rather than direct identification by PW1, suggesting the evidence linking him to the incident was flawed and unreliable. He relied on several decisions of this Court including: *Simuyu & Another vs. Republic* (2005) KLR 193 and *Anjononi vs. Republic* (1960) KLR 59.
20. The appellant also contended that the element of penetration was not proved beyond reasonable doubt because PW4 was not the person who filled the complainant's P3 form and treatment booklet. He further argued that PW4 gave evidence that contradicted the information in the treatment booklet, with regard to the PW1 having been defiled by someone unknown to her. In addition, he claimed that he was denied the chance to challenge the maker of the P3 form as required by the law.
21. Lastly, as regards grounds four, five and six, the appellant submitted that prosecution failed to call the arresting officer or members of the public who arrested him to shed light on this case. He argued that the investigation was not done to the required standard as provided for by law. Thus, the evidence of PW6 was inadmissible and in breach of section 29 of the *Evidence Act*, as he was a person not of the rank equivalent to that of an inspector. He further argued that his evidence was hearsay and indirect evidence; and relied on the case of *Kinyatti vs. Republic* (1984) eKLR and *Collins Omuse Obure vs. Republic*.
22. Additionally, the appellant contended that his rights under Article 50(2) (g), (h), (p) and (q) of *the Constitution* were violated during trial. And further, that the sentence that was imposed upon him goes against reformation and rehabilitation which should be the legitimate goals of sentencing.
23. Opposing the appeal, Mr. Ayodo submitted that the prosecution proved its case beyond reasonable doubt as it satisfied all the ingredients that constitute the offence of defilement. That is: age of the complainant, whereby PW1's Health and Nutrition Card was produced and it confirmed that she was 8 years old at the time of the incident; proof of penetration, which was done through the evidence of PW4 and corroborated by the evidence of PW1; and identification, which was proved by way of recognition by PW1 who testified that she had previously seen the appellant at the P.A.G in her school, and in addition, she recognized him at the police station upon his arrest.
24. As regards the issue of relying on the testimony of a single identifying witness, counsel argued that the trial court relied on section 124 of the *Evidence Act*, which allows it to receive the evidence of an alleged victim and if it believes that he/she is telling the truth, for which reasons must be recorded (and corroboration thereof is not mandatory), it can proceed and convict the accused person.
25. Lastly on sentence, counsel urged this Court not to interfere with the mandatory minimum sentence which was meted upon the appellant as per the law at the time of his conviction. He argued that the sentence was not only lawful but justified in the circumstances of the case.



26. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi vs. Republic* [2016] eKLR, it was held as follows:

“This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong -vs- R*, [1984] KLR 611.”

27. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. In our view, three issues fall for determination on this second appeal: whether the identification evidence was reliable; whether the evidence of PW4 (the clinical officer) was wrongly admitted into evidence; and whether the sentence imposed on the appellant was lawful.

28. The appellant challenges the identification evidence based on what he says are inconsistencies which should be resolved in his favour. He also says that the identification evidence was unreliable because the complainant had not given a description of him to the police. In our view, both of these arguments are misguided. We note that the complainant stated in her evidence that she had seen the appellant before at the P.A.G. church. PW4 also confirmed that the complainant had stated that her assailant was known to her. However, the P3 form states that the assault was by a person unknown to her. While this appears to be an inconsistency, it is a minor one and can be easily explained by the fact that officers routinely fill in the P3 form that a perpetrator is “unknown” where the survivor does not know the name of the perpetrator. The description “unknown” in this regard does not refer to the inability of the survivor to identify the perpetrator.

29. Neither is the identification evidence in this case weakened by the fact that the complainant did not give a formal description of the perpetrator to the police. As the circumstances of the offence rehashed above show, there was, in fact, no such opportunity: the survivor reported to the mother what had happened and indicated that she could identify both the place where she was assaulted and the person who assaulted her. She then took her father to the house and even correctly pointed out that the person they found at the house (PW5) was not the person who defiled her. In our view, the circumstances here fortify rather than weaken the identification evidence. In any event, the trial court believed that the complainant was telling the truth, as did the High Court on first appeal. We have no reason to upset the concurrent findings of the two courts below on this aspect of the case.

30. We now turn to the argument that the evidence of the clinical officer (PW4) should have been disregarded because he did not treat the complainant initially; and he was not the one who filled out the treatment notes. This argument is equally misguided. We note that PW4 is the person who filled out the P3 form and produced it in court. He was categorical that his expert opinion was based both on what he personally observed, and what his colleague had observed and recorded earlier in the treatment notes. This is standard procedure and process. There was no need to call the person who attended to the complainant when she initially went to the hospital as a witness. It would have been superfluous as PW4 examined the complainant and came to his professional conclusions which he recorded in the P3 form.

31. Having parsed through the entire record, we are satisfied that all the ingredients of the offence of defilement were proved to the required standard. There was both documentary and oral evidence that the complainant was seven years old; the identification evidence, as pointed out above, was ironclad;



and penetration was proved both through oral testimony as well as medical evidence. In short, the conviction was safe. In coming to this conclusion, we dismiss the appellant's contention that his right to fair hearing was violated during the trial. We do so for two reasons. First, he flippantly makes this argument in generic fashion without explaining how that right was violated. Second, he has raised this issue for the first time on this second appeal. He had thus, not preserved the issue for consideration before us.

32. We finally turn to the appeal against sentence. The appellant attacks the sentence of life imprisonment because it does not meet the essential objectives of sentencing namely reformation and rehabilitation of the offender. What the argument fails to come to terms with is the fact that the sentence imposed the mandatory one prescribed by statute. Section 8(2) of the *Sexual Offences Act*, under which the appellant was charged and convicted, is categorical that the only allowed sentence is life imprisonment. The Supreme Court has recently confirmed that this is so in *Republic vs. Joshua Gichuki Mwangi* (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12<sup>th</sup> July, 2024). In this case, the apex court categorically held that the mandatory sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the statutory minimum sentences in sexual offences.

33. The apex Court held:

“ 56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

57. In the *Muruatetu* case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.”

34. Following the doctrine of stare decisis as defined by Article 163(7) of *the Constitution*, this decision by the Supreme Court is binding on this Court.

35. The upshot is that the appellant's appeal in its entirety is unmeritorious and is accordingly dismissed.

36. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 10<sup>TH</sup> DAY OF JANUARY, 2025.**



**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H.A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

