



**Kinoba v Republic (Criminal Appeal 104 of 2018)
[2025] KECA 553 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 553 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 104 OF 2018
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
MARCH 21, 2025**

BETWEEN

FREDRICK MUTUA KINOBA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgement of the High Court of Kenya at Meru
(S. Chitembwe, J.) dated 16th July, 2018 in HCCRA No. 46 of 2017)*

JUDGMENT

1. Fredrick Mutua Kinoba, the appellant, was charged, tried and convicted by the Magistrate's Court at Nkubu for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 1st July 2015 and 13th September 2015 at Imenti South District within Meru County, intentionally and unlawfully caused his penis to penetrate the vagina of RM a child aged 7 Years, 7 Months. He was sentenced to life imprisonment.
2. Being dissatisfied with the conviction and sentence, he appealed to the High Court. In a judgment dated 16th July, 2018, the High Court (Chitembwe, J.) dismissed the appeal and affirmed the conviction and sentence.
3. Still dissatisfied, the appellant moved to this Court on second appeal challenging both conviction and sentence.
4. The brief facts of the case as presented before the trial court were as follows. RM, (hereafter, the child) who was 8 years at the time she was testifying, told the court that she had been defiled three times by the appellant at different times, venues and dates. She vividly and graphically described the incidents before the trial court, but this being an appeal based on points of law, it is not necessary to repeat those details.



5. On the third incident, which took place in the appellant's house, the appellant's wife who was away came back unexpectedly and caught her husband in the act of defiling the child. RM stated that they were both startled when the appellant's wife found them but she managed to escape when the appellant's wife went to the kitchen.
6. The child did not inform her mother, HK, about the said incidents and the mother remained clueless until she met one woman at the market who hinted as to what the child had been caught doing and asked the mother to confirm the rumour. The mother asked the child about the said rumour and it was then that the child narrated everything she had been subjected to by the appellant who she referred to as BabaK.
7. The mother testified that she called the appellant to inquire what had happened and he denied the allegations. She reported the matter to the police station from where they were referred to hospital where RM was examined and the P3 Form completed. She stated that the appellant was well known to her and to the child.
8. According to the medical officer who examined the child, it had taken two months before the examination was conducted. She testified that on examination there were no bruises or lacerations, the hymen was absent, there was no discharge noted. That the urinalysis showed pus cells, the HIV test was not reactive. She stated that the absence of hymen was suggestive of penetrative sexual intercourse.
9. After investigations, the appellant was arrested and charged as earlier stated.
10. When placed on his defence, the appellant gave sworn evidence and called one witness. He testified that the charge was fabricated against him because of an affair he had with the RM's mother and that when his wife heard about the affair, she felt jealous and blew things out of proportion. He nonetheless, admitted that the child was found in his house on 13th September 2015 when he is said to have been caught defiling the her by his wife.
11. His witness, Geoffrey Mwiti testified that he knew the appellant who was his friend. He stated that on 13th September 2015 he went to the appellant's house and found him taking tea and he was given tea by the appellant who was alone in the house. That at his door he found about five children, who included RM and one K, the appellant's son.
12. As he was leaving the house headed towards the gate, he met the appellant's wife and greeted her. He stated that at this time the appellant was in the house and the children were still playing with the bicycle outside the house.
13. On cross-examination he stated that he knew RM before that day as his shop is near their house. He stated that when he left the house, he can't tell what happened after he had left. That he was not aware that it was not the first time the appellant had defiled RM It was on that evidence that the appellant was convicted.
14. Before us, the appellant has raised six grounds of appeal, which include, inter alia, that the trial Judge erred in law: in failing to appreciate that the critical elements of defilement in penile penetration and identity were not proved as required in law; in not considering that there was bad blood (grudge) between the alleged victim's mother and the appellant over a love affair gone sour and that the victim was used as a pawn to effect revenge; that notwithstanding section 143 of the *Evidence Act* very crucial and essential witnesses were not availed in court to adduce evidence and that the life sentence meted remains harsh and manifestly excessive.



15. The appeal was heard by way of written submissions. The appellant appeared in person for the plenary hearing while Ms. Nandwa, Prosecution Counsel, represented the respondent. They both informed the Court that they wished to entirely rely on their submissions and they did not highlight them.
16. The appellant submitted that the child was coached on what to say in court. He submitted that there was no proof of penile penetration.
17. On crucial witnesses not being availed by the prosecution, he submitted that Esther Wanjiru, Freddie's wife and K were not availed and that due to this a lot of factual matters were left in limbo forcing the trial court to make a lot of assumptions which led to a miscarriage of justice.
18. On sentence he submitted that the life imprisonment meted was excessive and harsh and the Court should interfere with it by applying the Supreme Court decision in Francis Karioko Muruatetu & Another -vs- Republic [2017]eKLR,
19. Opposing the appeal, the respondent submitted that all the ingredients of defilement were proved. With regards to the age of the child, it was submitted that the prosecution had proved that the child was 7 years old at the time of the offence and that the same was proved by the birth certificate. Reliance was placed on Musyoki Mwakavi -vs- Republic [2014]eKLR.
20. On penetration it was submitted that the child testified that between 1st July 2015 and 13th September 2015, the appellant had defiled her three times and that she gave details of how the incidents had occurred and described how the appellant had defiled her and told her not to tell anyone.
21. Counsel submitted that the clinical officer who testified noted on examination that the child's hymen was absent which was suggestive of penetrative sexual intercourse. It was stated that PW3 noted that the reason there were no lacerations, swelling, blood or bruises was due to the fact that the child had been defiled prior to being examined. That the injuries were assessed as grievous harm and that the opinion formed by the witness was that there was penetration.
22. On identity of the perpetrator, it was submitted that the appellant was positively identified by RM as her assailant and that the same identification was by recognition as RM knew him prior to the defilement as they had lived in the same plot. It was submitted that in September 2015 the incident had occurred in the morning and that there was no room for any mistake and as such there was no mistaken identity as alleged by the appellant. Reliance was placed in Wamunga -vs- Republic [1989] KLR 426.
23. This being a second appeal, our remit is limited to consideration of matters of law only by dint of section 361 of the *Criminal Procedure Code*. This Court will also not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence.
(See Chemogong -vs- R. [1984] KLR 61; Ogeto vs- R [2004] KLR 14 and Koingo -vs- R (1982] KLR 213).
The test to be applied on second appeal is whether there was any evidence on which the trial court could reasonably find as it did. (See Reuben Karari S/o Karanja vs. R. [1956] 1 E.A.C.A. 146).
24. With the above caution in mind, we have considered the record, the grounds of appeal and the submissions of both parties. The main issues that we discern for our determination are: whether the two courts below were right in finding the elements of the charge of defilement proved; and whether this Court should interfere with the sentence that was imposed on the appellant.
25. There was no contest on the child's age which was proved by production of the birth certificate which indicated that RM was born on 16th February 2008. We shall not, therefore, belabor that point.



26. The next element that needed to be proved is penetration. The appellant complains that the medical evidence was insufficient to prove penetration. We are not persuaded. The Clinical Officer, who examined the child, testified that she found the hymen was absent and formed the opinion that this was suggestive of RM being involved in penetrative sexual intercourse. The medical evidence corroborated the child's evidence on how she was defiled severally by the appellant. There was, thus, sufficient evidence upon which the two courts below could rationally conclude that penetration had been proved beyond reasonable doubt.
27. This Court, in *Muhendu -vs- Republic* (Criminal Appeal 60 of 2018) [2024] KECA 322 (KLR) (22 March 2024) (Judgment), agreed with the observations made by the Supreme Court of Uganda in *Bassita -vs- Uganda S. C. Criminal Appeal No. 35 of 1995* with regard to proof of penetration that:
- “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's evidence and corroborated by medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”
28. There is no cause to fault the learned Judge's finding that the medical evidence analyzed, together with the evidence of the complainant established beyond any reasonable doubt, that the appellant engaged in sexual intercourse with RM, thereby defiling her. Moreover, under the proviso to section 124 of the *Evidence Act*, in sexual offences, the court can convict on the evidence of the complainant alone, provided it is satisfied that the complainant's evidence is truthful.
29. On the identification of the appellant as the perpetrator of the offence, RM testified that she knew the appellant who used to live in the same plot as them. RM was able to identify the appellant by way of recognition, as the perpetrator of the offence, as she had been with him on three different occasions during the periods of the entire sexual assaults. The appellant was, therefore, not a stranger to her but a person she knew. As stated in *Anjononi and Others -vs- The Republic* [1980] KLR:
- “Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger.”
30. We are, therefore, in agreement with the concurrent finding of both the trial court and the 1st appellate court, that, indeed, the appellant was properly identified as the perpetrator of the offence.
31. The appellant also complained that crucial witnesses were not called. He stated that one Esther Wanjiru, and K were not called as witnesses. We noted that the prosecution called the victim and her mother, the doctor who produced medical documents to prove defilement and the investigating officer who investigated the case. It is true that the prosecution has a duty to call all witnesses who have relevant evidence in support of the prosecution case but it is also true that it is not necessary to call a long line of witnesses where a case can be proved by calling only the relevant witnesses. See *Bukenya -vs- Uganda* [1972] EA 549, at page 550
32. There is also the appellant's complaint that his defence was not considered. The appellant in defence denied the charge and called one witnesses who however had no useful evidence to give on events that occurred on 13th September 2015. Geoffrey Mwiti (DW2) testified that he went to visit the appellant on the material day. In his evidence, he confirmed that he left RM in the vicinity. In fact, rather than exonerate the appellant, his evidence to a large extent corroborated the child's evidence.



- 33. In view of the above analysis, we find that all the elements of defilement were proved to the required standard. We find the appeal against conviction devoid of merit and we dismiss it accordingly.
- 34. On whether the sentence imposed on the appellant was unconstitutional and whether the learned magistrate was denied of his discretion in sentencing the appellant to a mandatory sentence of life imprisonment, we note that in meting out the sentence of life imprisonment, the trial magistrate noted that the prosecution had proved that RM was below 11 years and proceeded to sentence the appellant under section 8(2) of the Sexual Offences Act. The appellant was sentenced to life imprisonment as provided under the Act.
- 35. The Supreme Court in Republic -vs- Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) reiterated that as long as Section 8 of the Sexual Offences Act remains valid, life imprisonment is not unconstitutional. The Supreme Court affirmed the lawfulness of minimum/mandatory sentences in the Sexual Offences Act when it held that:

“(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... (62)Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below.”

- 36. In the circumstances, and for the reasons stated herein above, the appeal on sentence being restricted to severity, the same falls outside our remit by dint of section 361(2) of the Criminal Procedure Code. We find that this appeal lacks merit. Accordingly, we dismiss it in its entirety.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF MARCH, 2025

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

