



**Korir v Republic (Criminal Appeal 53 of 2019)
[2025] KECA 1095 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1095 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 53 OF 2019
JM MATIVO, PM GACHOKA & WK KORIR, JJA
JUNE 20, 2025**

BETWEEN

JOSEPHAT KIBET KORIR APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Kericho
(Mumbi Ngugi, J.) dated 7th February, 2019 in CRA No. 32 of 2017)*

JUDGMENT

1. Josephat Kibet Korir, (the appellant), was charged, tried and convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* at the Chief Magistrate's Court at Kericho in S.O. Criminal Case No. 3 of 2016. The particulars of the offence were that on 3rd and 5th May 2016 in Kipkelion West County within Kericho County, he intentionally and unlawfully caused his penis to penetrate the vagina of MC a child aged 13 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the same day and location as in the main count, he unlawfully and intentionally touched the vagina of MC, a child aged 13 years, with his penis.
2. The prosecution's case was founded on the testimony of 5 witnesses, namely, the complainant (PW1), the complainant's mother (PW2), the complainant's father (PW3), a clinical officer (PW4) and the Investigating Officer (PW5). The defence case rested on his unsworn testimony. He did not call any witness in support of his defence. He stated that he woke up on 5th May 2016 and went to work, then went home at 8.00 p.m, and while sleeping at 11.00 p.m., he heard a knock and opened the door only to find police officers. He was arrested and taken to court the following day. He denied committing the offence.



3. At the conclusion of the trial, the learned magistrate held that the complainant was barely 13 years old at the time of the offence, therefore, she was a child according to the law. He also found that the complainant and the appellant had cohabited as husband and wife and the appellant had ample opportunity to commit the offence. Accordingly, the trial court returned a verdict of guilty on the main count and convicted the appellant as charged. After considering the appellant's mitigation and a pre-sentence report, the trial magistrate sentenced him to serve 20-year imprisonment.
4. The appellant's appeal to the High Court against the said decision was unsuccessful. Undeterred, he is now before this challenging his conviction and sentence on the grounds that:
 - a. the learned judge erred in law by upholding the provided mandatory sentence of 20 years imprisonment but failed to note that the appellant was a first offender, was a young man thus the court could have awarded a definite sentence in consideration of the provisions of Sections 216 and 329 of the Criminal Procedure Code and Article 50 (1) (2) (p) of the Constitution and policy sentencing guidelines (2016)
 - b. the learned judge erred by upholding the appellant's conviction and sentence but failed to note that the complainant was a child of tender years and her evidence was given without administering voir dire examination to ascertain whether she understood the meaning of an oath. This was prejudicial to the appellant.
 - c. That the learned judge erred in law by upholding the appellant's conviction and sentence of 20 years imprisonment but failed to note that the ingredients of the charge defilement were not proved to the required standards of law.
5. When the appeal came up for hearing on 18th March, 2025 through the virtual platform, the appellant appeared in person while the prosecution was represented by learned State counsel, Mr. Omutelema. The parties had filed written submissions which they relied upon.
6. The appellant's submissions are dated 18th June, 2024. He contended that as much as the sentence was lawful, the court failed to consider the provisions of Sections 216 and 329 of the Criminal Procedure Code and sentencing guidelines 2016 before sentencing him, which was fatal to the prosecution's case since it went to the root of the prosecution's case. Relying on this Court's Court decision in *Okello v Republic* [2022] KECA 1034 (KLR) the appellant argued that courts can divert from the mandatory minimum sentences enshrined in the Sexual Offences Act and consider the circumstances of the offence. The appellant also relied on this Court's decision in *Dismas Wafula Kilwake v Republic* [2019] eKLR and argued that courts should freely exercise their discretion in sentencing.
7. Regarding the failure to conduct voir dire examination, the appellant relying on the High Court holding in *James Mwangi Muriithi v Republic* [2021] KEHC 9250 (KLR) argued that the trial court was obliged to conduct a voir dire examination to confirm whether the complainant understood the meaning of an oath or the need to speak the truth. Therefore, the appellant was prejudiced when the trial court failed to conduct the voir dire.
8. Regarding the essential ingredient of penetration, the appellant faulted the learned magistrate for placing much premium on the evidence of a broken hymen and presence of spermatozoa and argued that the fact that the clinical officer did not find any bruising on the appellant weakens the prosecution evidence. Relying on the case of *P.K.W v R* [2012] KECA 103 (KLR), he argued that the absence of a child's hymen is not proof of defilement and in this case, the doctor's evidence of penetration did not support PW1's evidence that the appellant defiled her. Therefore, it cannot be said that penetration was proved.



9. In opposition to the appeal, learned Senior Assistant Director of Public Prosecutions Mr. Omutelema asserted that all the elements of the offence were proved and the trial court and the first appellate court correctly rendered themselves in the matter. Regarding penetration, he maintained that it was PW1's testimony that when she was returning from her grandmother's house, the appellant offered to take her home on his motorbike. However, the appellant never dropped her home; he instead took her to his home, locked her up and had sex with her for several days. PW2 & PW3 corroborated PW1's evidence by testifying that PW1 went missing for four days and she was found by police officers, while PW4 a clinical officer corroborated PW1's evidence that PW1's hymen had been broken and there was presence of a whitish substance which was later confirmed to be spermatozoa.
10. Regarding the age of the complainant, Mr. Omutelema submitted that the complainant's mother produced a birth certificate as prosecution exhibit one which clearly indicated that the child was 13 years old.
11. Regarding identification, it was submitted that PW1 was able to identify the appellant as the person who carried her on his motorbike and it was PW5's testimony that after being tipped off by an informer, the appellant and PW1 were arrested in the appellant's rented house in Kipkelion. Therefore, the evidence of PW5 corroborated that of PW1.
12. Regarding sentence, counsel maintained that the appellant was given an opportunity to mitigate. However, mitigation notwithstanding the circumstances of the offence warranted the sentence meted out of 20 years' imprisonment, which was not only lawful but also not excessive or harsh. Mr. Omutelama also cited the Supreme Court case in Petition No. E018 of 2023 Republic v Joshua Gichuki Mwangi to buttress the lawfulness of the minimum mandatory sentence.
13. This being a second appeal, Section 361 (1) (b) of the *Criminal Procedure Code* bars this Court from entertaining appeals against sentence unless the subordinate court had no jurisdiction to pass the sentence or the sentence was enhanced by the first appellate court, or where the constitutionality of the sentence is in issue. Sentencing is a matter of discretion by a trial court and an appellate court must not replace its views on sentence with those of the trial court unless there are concrete grounds for doing so. This position of the law was recently restated by the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) thus:

“Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction.”
14. We have given due consideration to the record of appeal, the grounds of appeal as well as the submissions of the parties and the authorities cited. We identify the following issues as requiring our determination; whether defilement was proved to the required standards; whether a voir dire examination was necessary in this case; and whether the life imprisonment sentence is lawful.
15. In this Court the appellant has vehemently questioned those concurrent findings and maintained that the case against him was not proved as required in criminal proceedings. It thus behoves us to revisit the evidence tendered in support of the three ingredients of the offence viz; identification or recognition



of the offender, penetration and age of the victim. See the case of *George Opondo Olunga v Republic* [2016] eKLR.

16. PW1 identified the appellant as the person who defiled her.

She testified that the appellant offered to take her on his motorbike but he instead sped to his rented house, where they had sex till morning and that the appellant locked PW1 inside his house. This evidence was corroborated in material aspects by PW2, PW3 and PW4; indeed, PW5 found PW1 on the appellant's bed sleeping and they were both arrested and taken to the police station. The appellant did not dispute that fact. Thus, the identification of the appellant as the perpetrator of the crime was well established. Accordingly, the two Courts below did not err in reaching a similar conclusion that he was properly identified as the perpetrator of the offence.

17. With regard to the age of the complainant, the complainant herself told the court she was 13 years old and PW2 who is the complainant's mother produced a birth certificate as the prosecution Exhibit 1 and it is evident that the complainant was 13 years at the time of defilement. In the end, we find and hold that this was sufficient evidence to prove the age of the complainant as the two courts below correctly held.

18. Regarding the essential ingredient of penetration as an element of defilement. Section 2 of the *Sexual Offences Act* defines penetration as follows:

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

19. PW1 in her testimony stated that they had sex with the appellant. PW4 who examined the complainant on 13th May 2016 established that her hymen was broken and there was a whitish mucoid substance over the vulva which specimen upon analysis was confirmed to contain spermatozoa. Having considered the evidence on record, we find that the evidence by the complainant that the appellant defiled her was not shaken. Consequently, the ingredients of the offence were therefore well established.

20. Regarding whether a voir dire examination was necessary in this case; and whether the life imprisonment sentence is lawful. We have had an opportunity to carefully reconsider the record. We note that in the appellant's amended grounds of appeal, the issue of the trial magistrate failing to conduct a voir dire on the complainant was never raised and we also note that the appellant did not challenge his sentence before the first Appellate Court.

21. It follows therefore that this court sitting as a second appellate court can only entertain matters that were considered by the court being appealed from. An appeal can only lie where there has been a decision made by a lower court. If an issue was not brought up before the lower court, and therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal.

22. In *Peter Kihia Mwaniki v Republic* [2010] eKLR, this Court stated:

“Neither the appellant nor the prosecution raised any issue concerning the delay in bringing the appellant to court. Nor was the issue raised before the superior court on the first appeal. It was in either of those courts that the issue should have been raised so that an inquiry would be made regarding the issue, when both sides would possibly call evidence on the matter... By raising the issue at this late stage the appellant has, in a way denied the prosecution the Constitutional opportunity to explain the delay. This ground likewise has no merit.”



23. Being persuaded with the above dictum, we note that, the appellant having failed to raise the issue of failure by the trial magistrate to conduct a voir dire examination on the complainant and the failure to challenge the legality of his sentence in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before this Court and we are therefore precluded from making a determination on the issue. In any event, the record clearly shows that the complainant who was aged 13 years gave evidence on oath. There is nothing to suggest that at her age, she did not appreciate the nature of the oath she took.

24. The upshot of the foregoing is that this appeal has no merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCI Arb

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.

