



REPUBLIC OF KENYA



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**Waithaka v Republic (Criminal Appeal 49 of 2019)
[2025] KECA 1084 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1084 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 49 OF 2019
JM MATIVO, PM GACHOKA & WK KORIR, JJA
JUNE 20, 2025**

BETWEEN

ERIC MWANGI WAITHAKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (L. N. Mutende, J.) dated on her behalf by (Prof Joel Ngugi, J.) on 11th June 2019 in CRA No. 48 of 2017)

JUDGMENT

1. EMW, (the appellant), was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* at the Chief Magistrate’s Court at Nakuru in Case No. 145 of 2014. The particulars of the offence were that on 23rd June 2014 [Particulars Withheld] in Njoro District within Nakuru County, he intentionally and unlawfully committed an act by inserting his penis into the anus of F.N.W, a child aged 4 years.
2. The prosecution case rested on the testimony of 6 witnesses, namely, the complainant (PW1), the victim’s father, (PW2), the victim’s sister (PW3), a farmer, (PW4), the Investigating Officer (PW5), and a Clinical Officer (PW6). The defence case rested on the appellant’s unsworn testimony. He did not call any witnesses in support of his defence. At the conclusion of the trial, the trial court returned a verdict of guilty. After considering the appellant’s mitigation, the trial magistrate sentenced him to serve life imprisonment.
3. Dissatisfied with the said decision, the appellant appealed to the High Court at Nakuru in Criminal Appeal No. 48 of 2017 seeking to overturn his conviction and sentence. After hearing the appeal, Mutende, J. upheld both the conviction and sentence and dismissed the appeal.
4. Undeterred, the appellant has filed the instant appeal seeking to reverse the High Court decision citing 4 grounds of appeal essentially faulting the High Court for: (a) dismissing the appeal without



considering that the appellant was under age at the time of commission of the offence; (b) failing to consider that the P3 form did not support the allegations the appellant was charged with hence lack of evidence to prove that there was indeed penetration; (c) the sentence imposed is excessively harsh and unjust considering new jurisprudential development; and (d) this Court considers the provisions of section 333 (2) of the [Criminal Procedure Code](#) and order that the period he was in custody by considered.

5. When this appeal came up for virtual hearing on 17th March 2015, the appellant appeared in person while learned counsel Mr. Omutelema appeared for the respondent. Both parties relied on their written submissions.
6. In support of his appeal, the appellant submitted that at the time of the commission of the offence, he was under 18 years old as confirmed by the age assessment report. However, the trial magistrate said that he could be either 16 or 18 years old and went ahead and sentenced him as an adult. Furthermore, he maintained that the age assessment was conducted post- conviction, two years after the initial assessment. He maintained that he was 17 years at the material time and the learned Judge erred in not considering that fact.
7. Regarding the ingredient of penetration, he maintained that the doctor found no injuries in the complainant's anus, but contradicted herself by holding that there were blood stains in the complainant's underwear and it had a foul smell, yet she never saw the underwear since on the P3 form filled by the doctor it was indicated that: "...clothes left home have stains on underwear (sic) which is smelly."
8. The appellant maintained that it was impossible to find blood stains where there are no injuries and if at all there were stains on the underwear, then the same were not blood stains.
9. It is also the appellant's submission that his right to a fair hearing guaranteed under Article 50 (2) (g) and (h) were violated since he was underage, the court ought to have considered providing him with legal representation because the charges he was facing were serious and attracted life imprisonment if convicted. The appellant cited the High Court decision in *Chacha Mwita vs. Republic* [2019] KEHC 9083 (KLR) where Mrima, J. held that the accused person must be informed of his rights under Article 50 (2) (g) of [the Constitution](#) immediately he appears before a court of law on the first appearance regardless of whether the plea would be taken at that point in time or later.
10. Regarding the sentence, he reasoned that the life imprisonment is a harsh sentence and urged this court needs to substitute it with a lesser sentence because is remorseful, rehabilitated and ready to be reintegrated back to the community. He cited the case of *Manyeso vs. Republic* [2023] KECA 827 (KLR) where this court held that indeterminate life sentences fall afoul the provisions of Articles 27 and 28 of our Constitution purposively interpreted.
11. Lastly, the appellant submitted that while considering the sentence, it should take into account the time of arrest and the time he spent in custody before being convicted and sentenced by the subordinate court as required by Section 333 of the [Criminal Procedure Code](#).
12. In opposing the appeal, the respondent's counsel Mr Omutelema maintained that penetration, one of the ingredients of the offence was proved by overwhelming evidence because PW6 produced a medical report which indicated that the child's underpants had blood stains and on cross examination PW6 confirmed that the complainant had been defiled. Further, counsel submitted that PW4 (Stephen Misieni) testified that on 23rd May 2014 at about 5.00pm while walking home, he saw the appellant and the complainant walking behind him, but later he realized they were no longer behind him and when he turned back he heard the appellant tell the complainant to undress while in a maize plantation,



and he went to call PW3 who found the appellant defiling the complainant, and at that moment PW4 arrested the appellant.

13. On the legality of the sentence, Mr. Omutelema submitted that 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) determined that the minimum mandatory sentences in sexual offences are lawful and therefore the sentence meted upon the appellant was lawful. Counsel urged that bearing in mind the aggravating circumstance of this case, which include the vulnerability of the complainant, and the trauma occasioned to the child, the sentence of life imprisonment ought to be upheld.
14. This is a second appeal, therefore, our jurisdiction is limited to considering matters of law as stipulated by Section 361 of the *Criminal Procedure Code*. A second appeal must be confined to points of law and. (See *David Njoroge Macharia vs. Republic* [2011] eKLR).
15. First, we will address the question of whether penetration was proved. Section 2 of the *Sexual Offences Act* defines penetration as “the partial or complete insertion of the genital organs of a person into the genital organ of another person.” in *Evans Wamalwa Simiyu vs. Republic* [2016] eKLR this Court stated that the offence of defilement is complete immediately there is an act that causes partial or complete insertion of the genital organs of the perpetrator’s genital organs into a child’s genital organs. This Court clarified that:

“...it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.”
16. The first Appellate Court after re-analyzing the evidence adduced before the trial court arrived at similar findings as the trial court. It stated:

“PW3 and PW4 were emphatic that they found the appellant with the child. PW3 stated that she saw the appellant having sex with the child and on seeing them he stopped but continued kneeling down. The child had a shirt on but no under pant. PW4 on the other hand explained that the appellant was raping the child through his anus. Medical evidence was adduced by PW6, Nancy Njenga a holder of a Degree in Counselling Psychology & Diploma in Clinical Medicine, therefore a Clinical Officer duly registered per Number 3062. She produced the P3 pursuant to Section 33 and 77 of the *Evidence Act*. The author of the document, a Mr. Cheruiyot was stated to have left practice but PW6 had worked with him for 4 years therefore was conversant with his handwriting and signature.”
17. PW2, testified that the appellant grabbed him and took him into a maize plantation, where he removed his shorts and underwear and lay on top of him and that the appellant asked him if he was enjoying the act. We also note that there was corroborating evidence by PW4, who stated that on 23rd June 2014, while walking home he saw the appellant who subsequently disappeared inside a maize plantation with PW1 who he had been following and when PW4 became suspicious and walked back, he heard the appellant telling PW2 to remove his trouser. Furthermore, PW3, who is the complainant’s sister corroborated PW4’s evidence by testifying that PW4 came to her home and asked her to accompany him to a shamba some meters away from home and it is on that maize plantation that she saw the appellant having anal sex with the complainant who at the scene inside the maize plantation had a shirt on but no short or under wear, and it is then that PW4 arrested the appellant and took him to the police station.



18. The clinical officer (PW6) in cross examination confirmed that PW2 was defiled anally and produced a P3 Form filled by his former colleague Cheruiyot on 24th June 2014, a day after the incident which report concluded that the complainant was harmed as a result of the appellant's actions.
19. In *Evans Wamalwa Simiyu vs. Republic* [2016] eKLR this Court stated that the offence of defilement is complete immediately there is an act that causes the partial or complete insertion of the genital organs of the perpetrator into a child's genital organs. It underscored it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.
20. We have reconsidered the evidence on record in totality. We note that the two courts bellows arrived at concurrent findings of fact relating to the issue at hand and both courts concluded that penetration was proved. Having re-evaluated the evidence afresh, we find no reason to depart from the concurrent findings by the two courts below on the issue at hand. Consequently, penetration was established to the required standard. This ground of appeal fails.
21. As the learned judge observed, the complainant's age was not disputed and it was confirmed by the appellant who acknowledged that the complainant's birth certificate was produced. The appellant has not questioned the complainant's age in this appeal. Therefore, we find no reason to belabor on this point.
22. Similarly, the appellant did not contest whether he was properly identified before the two courts below, nor did he raise it before us. We also find no reason to address this ground, save to mention that there is sufficient evidence identifying him as the offender.
23. Regarding the alleged violation of the appellant's right to a fair hearing guaranteed under Article 50 (2) (g) and (h) of *the Constitution*, this Court in *William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) vs. Republic (Criminal Appeal 49 of 2020)* [2022] KECA 23 (KLR) held that the operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial. The court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since *the Constitution* demands it. However, in the present appeal, we note that the appellant was ably represented by Mr. Mongeri when PW1 and PW2 testified. However, from 23rd April 2015, the appellant was unrepresented. However, the appellant did not raise the issue of legal representation either before the trial court or before the High Court. In fact, the trial court record shows that the appellant participated in the trial and cross-examined the witnesses (PW3 -PW6), and it is not evident that he suffered any substantial injustice. For these reasons, we do not find any merit in the appellant's arguments that his rights to a fair trial on under Articles 50 (2) (g) and (h) of *the Constitution* were violated.
24. In any event, the appellant having failed to raise the issue of violation of his right to legal representation pursuant to Article 50 (2) (h) of *the constitution* in his appeal before the High Court, he was precluded from raising the said issue in this appeal. Therefore, we are precluded from determining the issue.
25. Lastly, regarding the legality of the sentence, it is noteworthy that the mandatory minimum sentence provided for defilement of a child aged 11 years or below under section 8 (2) of the *Sexual Offences Act* is the life imprisonment that was meted on the appellant. Nevertheless, we have carefully considered the appellant's amended grounds of appeal before the High Court and his submissions before the High Court. We note that the appellant did not specifically complain on the constitutionality of the life sentence imposed on him before the High Court, therefore, the said issue was not placed before the



High Court for its determination. However, a question touching on the constitutionality of a sentence is a point of law, which this Court can interrogate.

26. Notably, the appellant argument is that he was aged 17 years at the time of commission of the offence. This argument raises a pertinent question, which is whether the sentencing court and the first appellate court ought to have considered his age as at the time of the commission of the offence while passing the sentence. The trial court in passing the sentence of life imprisonment reasoned as follows:

“There is no document to prove that the accused herein (sic) to show exact age of the accused person as at June 2014. The age assessment of August 2014 shows he was approximately 17 years. This being an approximation means the accused could have been aged between 16- 18 years. Where an accused has been convicted and he is pending (sic) to be a minor, the burden is on him to prove that he is the age he is saying he is. The accused has failed to supply any document in this court to prove his age. This being a convict for defiling a child aged four years I sentence him to life imprisonment.”

27. In upholding the finding by the trial court, the first Appellate Court had this to say:

“24. The contention of the Appellant was that he was a child at time of the act. That the trial Court failed to consider having an age assessment done to disapprove the allegation of the Appellant having been 17 years old as alleged.

25. On the charge sheet it was indicated the Appellant was 18 years old. On the 11th August,2014 an order was made by the Court requiring the appellant to be subjected to age assessment. As at 18th August,2014 his age was approximated to be 17 years. Another age assessment was done on the 13th April,2017 and it was found that the appellant was above 18 years old.

25. Prior to sentencing the appellant, the trial court acted judiciously by requesting for a further determination of the age and it was established that he was an adult, above 18 years. He could have not considered having him detained in a Borstal institution since he was above the age of eighteen years. The trial magistrate did not fall into error in meeting out the sentence.”

1. On the question of his age, we note that the appellant only states that he was underage at the time of commission of the offence. The age of the appellant is a question of fact that was dealt with by the trial court and the first Appellate Court. As held in the case of David Njoroge Macharia vs. Republic (supra) this Court will not interfere with concurrent findings of fact arrived at 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 demonstrably shown to have acted on wrong principles in arriving at its findings. We note that in his evidence, the appellant only stated as follows: “I live in Njoro. I didn’t defile that boy. They framed me because they hate me. I was sent by my parent to go and borrow beans and that is when I was framed.”

29. It is trite that in a criminal trial, the burden remains with the prosecution always and never shifts to the accused. We note that on this question of age, the prosecution produced in evidence two outpatient treatment cards one for the complainant, dated 23.6.2014 who was being examined on injuries caused by sodomy and the other for the appellant, equally dated 23.6.2014 who was examined for injuries caused by a mob. Those two cards were produced in evidence by Nancy Njenga, PW6. Part of her evidence in chief states as follows: “I have a card for Eric Mwangi (appellant) aged 18 years.” The record shows that the appellant did not question this issue of age and only asked one question, which



the witness replied as follows: “from the OP card, the child was anally defiled. You were treated after members of the public beat you up.”

30. Clearly, that was the first opportunity that the appellant had to dispute his age. We note that the trial court and the first Appellate Court examined the evidence on age, including the age assessment reports and we do not find any basis that we can interfere with that question of fact. We are alive to the provisions of Section 8 (7) of the *Sexual Offences Act*, which states that where an accused is below the age of 18 years, he shall on conviction, be sentenced in accordance with the provisions of *Borstal Institutions Act* and the Children’s Act. Age is a question of fact and it cannot be raised casually on an appeal as the appellant is trying to do in this case. Where such an issue is raised properly, the Court on appeal can examine such an issue as a question of law and also consider the provisions of Article 53 of *the Constitution*.
31. In conclusion, we find that the grounds of appeal have no merit. Resultantly, we dismiss the appeal both on conviction and sentence. It is so ordered.

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

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. ARB, FCIARB

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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

