



**Musembi v Republic (Criminal Appeal E034 of 2024)
[2025] KEHC 5591 (KLR) (Crim) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5591 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E034 OF 2024
AB MWAMUYE, J
APRIL 30, 2025**

BETWEEN

JOSEPH MUSEMBI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the original conviction and sentence by Hon.
M. Kivuti (PM) delivered on 23rd May, 2023 in Makadara Chief
Magistrate's S.O. Case No. 240 of 2020, Republic -vs- Joseph Musembi)*

JUDGMENT

1. The Appellant, Joseph Musembi was charged and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. He was sentenced to serve 20 years imprisonment, later reduced to 17 years to factor in time spent in custody. The Appellant was equally charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. It was alleged that on 14th September, 2020 at [Particulars Withheld] in Embakasi sub county within Nairobi County, the Appellant intentionally caused his penis to touch and penetrate the vagina of F.M a child aged twelve (12) years.
3. The Appellant pleaded 'not guilty' to both counts and the matter proceeded for trial. The prosecution called a total of five witnesses in support of its case against the Appellant. At the close of prosecution's case, the Trial Court was satisfied that the prosecution had established a prima facie case against the Appellant; and consequently, put the Appellant on his defence.



4. The Appellant took the stand and gave unsworn evidence but did not call any other witnesses. At the close of the Appellant's case, the trial court convicted the Appellant of sexual assault contrary to Section 8(1) as read with Section 8 (3), of the *Sexual Offences Act*. After hearing the Appellant in mitigation, the trial court sentenced the Appellant to a term of twenty (20) years imprisonment, which was reduced to 17 years to factor in time spent in custody.
5. Aggrieved by both conviction and sentence, the Appellant lodged this appeal citing several grounds, among them that:
 - i. The charge sheet was defective;
 - ii. The prosecution failed to prove the offence beyond a reasonable doubt;
 - iii. The sentence was harsh and excessive.
6. The parties filed and exchanged written submissions in the Appeal. The Appellant's written submissions were not dated but was filed on 28th January, 2025 while those of the Respondent were dated 20th January, 2025.
7. In his written submissions, the Appellant argued that the charge sheet was defective as it failed to explicitly state that the act of penetration was unlawful. He contended that the charge did not align with the evidence presented during trial, making it prejudicial to his defense. Additionally, he submitted that the prosecution failed to prove the offence of defilement beyond a reasonable doubt, particularly on the crucial elements of penetration and identification. He highlighted inconsistencies in the medical evidence, especially concerning the DNA analysis, which initially indicated that the samples were taken from the complainant's mother rather than the victim.
8. The Appellant also raised an alibi defense, asserting that he was at work at the time of the alleged offence. He argued that the prosecution failed to rebut this alibi and that the trial court erred in dismissing it without sufficient consideration. Furthermore, he challenged the sentence imposed, asserting that the 20-year imprisonment which was later reduced to 17 years being harsh and excessive given the mitigating factors. He emphasized that he was a first-time offender, that the complainant's mother had requested leniency and even sought to withdraw the case, and that he had already been in custody since 2020. He urged the appellate court to consider these factors and grant him a more lenient sentence.
9. On the other hand, the respondent's submissions focused on proving the elements of defilement: penetration, age, and identification. The Respondent submitted that all elements of the offence were proved beyond reasonable doubt and the appeal should be dismissed since the trial court's conviction and sentence was safe and proper. Regarding the alibi defense, the Respondent contended that it was an afterthought, raised too late in the trial to be credible. They relied on *Republic v Sukha Singh s/ o Wazir Singh & Others (1939) 6 EACA 145*, which held that an alibi should be raised at the earliest opportunity to allow for proper verification.
10. This being the first appellate court, it is our duty as well set out in the case of *Okeno vs Republic (1972) E.A 32* which states 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 vs Republic [1957] E.A. 336*) and to the appellate court's own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions. (*Shantilal M. Rulwala vs Republic [1957] E.A 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there



was some evidence to support the lower court's findings 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 had the advantage of hearing and seeing the witnesses."

11. Further in the case of Mark Oiruri Mose vs Republic [2013] eKLR Criminal Appeal No. 295 of 2012 the court of appeal stated: -

"It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."

12. Having reviewed the proceedings and the submissions of both parties, the following are the key issues for determination:

- a. Whether the charge sheet was defective;
- b. Whether the prosecution proved the elements of defilement beyond a reasonable doubt;
- c. Whether the identification of the accused was free from error;
- d. Whether the defence of alibi was duly considered;
- e. Whether the sentence was lawful and justified.

13. On the first issue, The Appellant contends that the charge sheet was defective for failing to state that the act of penetration was unlawful. The law regarding defective charges is settled. In Jason Akumu Yongo v Republic [1983] KECA 44 (KLR) the Court of Appeal held that a charge is defective if it does not conform to the evidence adduced at trial or fails to disclose an offence known to law.

14. A review of the charge sheet in this case reveals that it correctly stated the offence as "defilement" under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. 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 organs of another person". The dictionary on the other hand defines penetration as - "The action or process of penetrating something". The Charge sheet read as follows: "On 14th September of 2020 at [Particulars Withheld] in Embakasi sub-county, within Nairobi County, intentionally caused his penis to penetrate the vagina F.M a child of 12 years". The omission of the word "unlawful" does not render the charge fatally defective, as unlawfulness is implied in the act of defilement itself. Further, Section 382 of the *Criminal Procedure Code* provides that no finding shall be reversed on account of an error that does not occasion a failure of justice.

15. In Sigilani v Republic [2004] eKLR 480, the court held that a charge is only defective if it does not accord with the evidence presented, thus leading to prejudice against the accused. In this case, the charge sheet sufficiently disclosed the offence, and there was no demonstration of prejudice suffered by the appellant. The charge sheet, therefore, remains valid.

16. On the second issue, I wish to consider whether the three ingredients of defilement were proved beyond reasonable doubt. The prosecution was required to prove the following elements of defilement: the age of the complainant; whether there was penetration; the positive identification of the assailant.

17. With regard to the age of the complainant, the complainant's birth certificate, produced in evidence, showed that she was 12 years old at the time of the alleged offence. The trial court correctly found that



the complainant was within the statutory bracket provided under Section 8(3) of the *Sexual Offences Act*. In *Hadson Ali Mwachongo v Republic* [2016] eKLR, the court emphasized that documentary evidence such as a birth certificate is the best proof of age, as was presented in this case.

18. From the record of the trial court, I am satisfied that there was no error in the identification of the complainant's age as a twelve-year-old minor. The production of her birth certificate was sufficient proof and, in any case, not in dispute in this Appeal.
19. On whether there was penetration, 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 organs of another person." Medical evidence from PW3 noted minor lacerations on the complainant's perineum and labia minora, and presence of spermatozoa on a vaginal swab. This evidence, together with the complainant's direct testimony, sufficiently established penetration.
20. Section 36(1) of the *Sexual Offences Act* provides as follows:

“ 36.

- (1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

21. That provision has been considered by this Court in among other cases, *Robert Mutungi Muumbi v Republic*, Cr App No. 52 of 2014 (Malindi) and *Williamson Sowa Mbwanga v Republic, C App. No. 109 of 2014* (Malindi). In the former, the court expressed itself thus:

“Section 36(1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.”

And in the latter case the court stated as follows: -

“...A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See *Twehangane Alfred V. Uganda*, CR. APP. NO. 139 OF 2001).” It is partly for this reason that section 36(1) of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing.”



22. Under the proviso to section 124 of the *Evidence Act*, a trial court can convict the accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (See *George Kioji v. Republic*, Cr App No. 270 of 20102 (Nyeri) and *Jacob Odhiambo Omumbo v. Republic*, Cr. App. No. 80 of 2008 (Kisumu)). The trial magistrate expressed himself as follows regarding the evidence of DC:
- “Having seen the confident and consistent manner in which the complainant testified, I have no doubt that she was telling the truth on the matter.
23. Later in the judgment the magistrate re-visited the issue and stated:
- “I have already noted that the complainant gave her testimony in a confident and consistent manner leading me to believe that she was telling the truth. Furthermore, when the accused was cross-examined as to why the complainant should lie that he was the one who had sexual intercourse with her leading to her pregnancy, the accused could not ascribe any reason for it. Although it is never the duty of an accused to prove his innocence, his sworn statement and evidence in cross-examination did not raise any reasonable doubts as to the testimony of the complainant.”
24. During cross-examination, PW4, the government analyst, initially indicated that the DNA samples were taken from Lydia Shitanda, the complainant’s mother. However, upon inquiry from the investigating officer, she clarified that the DNA samples were indeed taken from F.M., the complainant. PW4 admitted that she made an error in documentation but confirmed after consultation that the samples analyzed were from the victim. The clarification provided by PW4 eliminated any doubt regarding the source of the DNA samples and reinforced the prosecution's case.
25. The Court of Appeal in *Mark Oiruri Mose v Republic* [2013] eKLR held that penetration does not require the rupture of the hymen and that even partial penetration suffices. In this case, the complainant testified that the appellant removed her undergarments and inserted his genitalia into hers. Her testimony was consistent and corroborated by medical evidence. Therefore, penetration was proven beyond reasonable doubt.
26. On whether the assailant was positively identified, the complainant testified that the Appellant was well known to her as a neighbour, and she had been to his house multiple times. Her testimony was direct and unwavering. The conditions for positive identification were favorable as she was in close proximity to the Appellant for a considerable period before and during the offence.
27. The Court of Appeal in *Anjononi & Others v Republic* [1980] eKLR stated that recognition is more reliable than mere identification of a stranger. In this case, the complainant’s testimony was credible, and no evidence suggested mistaken identity. The Appellant was, therefore, positively identified as the perpetrator and I find that the trial court did not err in finding the Appellant as the assailant.
28. The Appellant raised an alibi defence, stating that he was at work at the time of the alleged offence. However, an accused person bears no burden of proving an alibi. In *Karanja v Republic* [1983] KLR, the Court of Appeal emphasized that once an alibi is raised, the prosecution must disprove it.
29. The trial court correctly rejected the alibi, finding that it was raised belatedly and did not cast doubt on the prosecution’s case. In *Republic v Josephat Mwenda M’Ngarithi* [2020] eKLR, the court emphasized that where an alibi is inconsistent with overwhelming evidence from the prosecution, it can be disregarded. The complainant’s testimony, coupled with medical evidence and corroborating witnesses, sufficiently placed the Appellant at the scene of the crime.



- 30. On the last issue, an appellate court should not interfere with a sentence unless the trial court acted upon wrong principles or overlooked material factors. (See *Ogolla s/o Owuor v Republic* [1954] EACA 270).
- 31. Section 8(3) of the *Sexual Offences Act* prescribes a minimum of 20 years imprisonment for defilement of a child aged between 12 and 15 years. The Appellant was sentenced to serve 20 years imprisonment, later reduced to 17 years to factor in time spent in custody. I find no error of law by the Trial Court’s sentence, and this Court upholds the same.
- 32. It is my overall finding that the Trial Court’s conviction and sentencing of the Appellant do not warrant interference by this Court sitting on appeal; and consequently, I dismiss the Appeal herein as it lacks merit.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL 2025.

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BAHATI MWAMUYE

JUDGE

