



**Musiomi v Republic (Criminal Appeal E006 of 2024)  
[2025] KEHC 5196 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5196 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E006 OF 2024**

**S MBUNGI, J  
APRIL 29, 2025**

**BETWEEN**

**LIKHANGA HASSAN MUSIOMI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgement, conviction, and sentence of  
Hon. N.O. Amboko (SRM), in Kakamega Chief Magistrate's Court  
Criminal Case No. 116 of 2021 delivered on 29th January 2024)*

**JUDGMENT**

1. The Appellant, Likhanga Hassan Musiomi, was convicted of the offence of defilement contrary to Section 8(1)(3) of the *Sexual Offences Act* No 3 of 2006. He was later convicted and sentenced to serve twenty (20) years' imprisonment.
2. The particulars of the offence were that on 19<sup>th</sup> day of March 2023, at Kakamega East Sub-county intentionally and unlawfully caused his penis to penetrate the vagina of RB a child aged 14 years.
3. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars were that on 19<sup>th</sup> day of March 2023, at Kakamega East Sub-county intentionally and unlawfully touched the buttocks/ breasts/ vagina of RB, a child of 14 years with his penis.
4. The Appellant, in a Petition of Appeal dated 9<sup>th</sup> February 2024, challenges the conviction and sentence on the following grounds: -
  - a. That the learned trial magistrate grossly erred in both law and fact by convicting the appellant, whereas the evidence did not meet the required standard of proof beyond a reasonable doubt.



- b. That the learned trial magistrate erred in law and in fact by not informing the accused on his right to representation, hence the accused was not represented all throughout the trial.
- c. That the learned trial magistrate erred in both law and fact by allowing the complainants' evidence, which founded the judgment, where it was not corroborated by medical evidence as required by the *Evidence Act*.
- d. That the learned trial magistrate failed to observe that the prosecution failed to organize for the examination of the appellant to establish whether he was the perpetrator of the alleged offense.
- e. That the learned trial magistrate failed to adequately consider the appellant's defence.
- f. That the learned magistrate erred in law and fact by shifting the burden of proof to the appellant contrary to section 124 of the Evidence of the evidence in favour of the complainant while bluntly dismissing the evidence of the defence, thus rendering the judgment an opinionated judgment.
- g. That more grounds to be adduced upon receipt and perusal of the trial court proceedings and judgment.

#### **Appellant's Submissions.**

5. The appellants stated that he had filed his submissions but at the time of writing this judgment, the submissions were not traceable on the court's record.
6. The respondents did not file their submissions.

#### **Summary of the evidence**

7. PW1 was the complainant; she testified that the accused was her neighbor and on 19/3/2023 at around 1.00 pm. She met a boy while coming from church, and she showed him directions to Mukomari. She claimed that she met the accused on the road and she went home to change her clothes before proceeding to go untie the cows for grazing that's where she met the accuses near the tea plantation and he asked her to have sex with her if she didn't want him to tell her mother about talking to the boy earlier.
8. The complainant testified that the accused pulled her to the sugarcane plantation with a knife and threatened to kill her. He proceeded to remove his trousers and pulled her skirt up, pushed her to the ground, and forcefully had sex with her while gagging her so that she would not scream, and told her not to tell anyone as it was their secret.
9. The complainant stated that she got up, went home, and informed her mother, who took her to Vihiga Hospital. She produced her birth certificate marked PMF1-1, indicating that she was born on 10/10/2008 and was 14 years old at the time of the incident
10. According to the complaint, they went to the hospital on Sunday and were informed to come back on Monday, where she was treated at Ileho health center and later escorted to Mukhonje police station.
11. During cross-examination, she claimed that they did not live far away from the accused.
12. PW2 was the complainant's mother, who testified that the accused was their neighbor. She recalled that on 19/03/2023, they had gone to church when PW1 left to clean her bag. She gave her the house keys. She claimed that later, she started to look for Pw1 with the help of her grandson and couldn't trace her until she heard her daughter in law screaming that someone had been raped and that's when



- she discovered it was her daughter who had blood on her skirt and crying claiming that the accused had defiled her.
13. They went to the health center, and they were informed to come the next day. Since it was a Sunday, she was later examined and given medication. She produced the treatment notes as PMF1 2 and the PRC as PMF1 3.
  14. They were later referred to Mukhonje police station, where the P3 form was filled on 21/3/2023, which was produced as PMF1 4.
  15. Pw3 was PW1 sister she stated that she knew the accused and on the material day, she received a call that PW1 had been defiled and when she got home found PW1 crying, her skirt was blood stained she took her to the hospital where first aid was done. PW1 informed her that she was defiled by the accused person and that the accused threatened to kill her if she scream or disclosed what happened to anyone.
  16. She later escorted the complainant to the police station.
  17. PW4 testified that Pw1 was her sister in law and on 19/03/2023 at about 1-2 P.m. she was on her way to the market when she met PW1 crying, PW1 told her that the accused had raped her. She PW1 to her mother inlaw who thereafter took her to the hospital.
  18. PW5 was the clinical officer from Lihelo Health Center. he confirmed that he examined the victim on 21/3/2023, who was 14 years old. He testified that her panty had blood, she was in pain and her vagina was bleeding and after a High Vagina swab revealed that there was presence of blood and spermatozoa. She was given medicine for treatment.
  19. He produced the treatment notes as exhibit 2 and PRC as exhibit 3.
  20. PW6 testified that on 20/3/2023 he was at the police station front office when the complainant and her mother came to report that the minor had been defiled. he issued them with the P3 form. He recorded the statement and took the minor's clothes which was a yellow panty which was blood stained as an exhibit, a skirt which was dirty, muddy and blood stained, and Grey top with mud on the back as exhibit 5,6 and 7 respectively.
  21. He took 3 photographs of the scene which was at a sugar cane plantation, which confirmed that the soil was disturbed and produced the 3 photographs as exhibit 8 (a)- (c) and a certificate of photographic prints as exhibit 8 (d).
  22. He confirmed that at the time of the incident, the complainant was 14 years having been born on 10/10/2008. He produced a letter from the primary school which indicated that the minor was in class 7 as exhibit 9.
  23. The prosecution closed its case and the court found that the prosecution had established a prima facie case against the accused, and the accused was placed on his defense.
  24. Dw1 denied being involved in the incident and claimed that it was just a family feud and hatred between himself and the complainant's mother. The trial court after analyzing the evidence and the law found the accused guilty and convicted him for offence charged with and after considering his mitigation and the period the accused spent in custody sentenced the accused to serve 20 years' imprisonment.
  25. The accused being dissatisfied with the whole judgment filed the current appeal.



## Legal analysis

26. The Appellant court's duty is to re-evaluate the evidence afresh and arrive on its own independent conclusions. This was stated in the in the case of *Okeno vs. Republic* (1972) EA, where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its conclusions (*Shantilal M. Ruwala V. R* [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 findings and draw its 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 has had the advantage of hearing and seeing the witnesses, see (*Peters V Sunday Post* 1978) E.A. 424.”

27. I have considered the grounds of appeal, evidence adduced in the lower court, and the respective parties' submissions. I find the main issues for determination are;

- a. Whether the prosecution proved all the ingredients of defilement beyond a reasonable doubt.
- b. Whether the court erred by not informing them of the right to legal representation
- c. Whether the prosecution failed to organize an examination for the appellant

28. Section 8(1) and (3) of the *Sexual Offences Act* provides that: -

- “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) .....
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

29. In *George Opondo Olunga v Republic* [2016] eKLR, it was stated that the ingredients of an offence of defilement are;

‘...identification or recognition of the offender, penetration and the age of the victim.’

30. The key ingredients for the offence of defilement are therefore, age of the victim, the fact of the penetration, and whether the Appellant herein was properly and positively identified as the culprit.

31. On the Proof of age of the complainant, it was the prosecution's case that the complainant was 14 years old at the time of the offence. The birth certificate marked Exhibit 1 was produced as evidence, and it showed that the minor was 14 years old. The Appellant did not contest the aforesaid evidence.



32. It is the age of the complainant that determines the sentence to be imposed. In the case of Hilary Nyongesa -V- Republic (Eldoret Criminal Appeal No. 123/2009 Muilu J. (as she then was) stated as follows:
- “Age is a critical aspect in sexual offences that has to be conclusively proved..... And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”
33. In the case of Edwin Nyambogo Onsongo v Republic [2016] eKLR, while citing the case of Mwolongu Chichoro Mwanjembe v Republic, Mombasa Criminal Appeal no.24 of 2015 (UR), the Court of Appeal stated: -
- “... the question of proof of age has finally been settled by recent decisions of the court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card, or by oral evidence of the child if the child is sufficiently intelligent or the evidence of parents or guardian or medical evidence, among other credible proof...”
34. I find the birth certificate that was tendered to be credible and hold that the age of the minor was proven to the required standard.
35. On whether the Appellant was positively identified as the perpetrator, The Appellant was well known to the complainant. The complainant referred to the accused as her neighbor who was known to him and the incident occurred at 1.00 p.m. hence the identification was through recognition.
36. The Court of Appeal in the case of Anjononi & Others v Republic [1989] KLR held the evidence of recognition to be “more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the person’s knowledge of the assailant in some form or other.”
37. The Court of Appeal in the case of Karanja & another vs Republic [2004] KLR 140 equally pronounced itself on the exercise of caution in admitting evidence of identification as follows: -
- “Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction, R - V – Eria Sebwato [1960] E.A. 174 .....a witness may be honest but mistaken.
38. The complainant was able to identify the Appellant as her neighbor. In light of the above finding, I hold that identification was positively proved.
39. The final element that needs to be proved is penetration. Penetration is defined under Section 2 of the Sexual Offences Act as follows:
- “The partial or complete insertion of the genital organ of a person into the genital organs of another person.”
40. Penetration is proved through the evidence of the victim, corroborated by medical evidence. The testimony of the victim in this case, coupled with a medical examination, must be sufficient to determine whether penetration occurred.
41. Section 124 of the Evidence Act, Cap 80, provides as follows:
- “Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the



Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

42. In the present case, the complainant testified that on 19/3/2023, she had left the church and was on her way, she met the accused person, who attacked her and pulled her to the sugarcane plantation, defiled her, and later threatened to kill her if she told her mother.

43. The Medical evidence was provided by (PW5), who was the clinical officer who examined the complainant on 21/03/2023, confirmed that the complainant's hymen was broken and that there was spermatozoa and blood on PW1. He produced the treatment notes, P3, and the PRC form that confirmed the defilement.

44. Section 124 of the Evidence Act, Cap 80, provides as follows:

“..... Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

45. The elements to prove defilement are the age, identification, and penetration. This is coupled by section 124 of the Evidence Act on the evidence of a single witness in a sexual offence. The evidence of the witness of what they saw or did not see is important, but that does not negate the fact that a defilement occurred.

46. In my view, the prosecution at the trial court was able to establish the three elements, and thus they proved their case beyond a reasonable doubt.

47. Whether Article 50 (2)(g) of the Constitution was infringed during the trial?

The provision states as follows: -

50(2) Every accused person has the right to a fair trial, which includes the right-

g. To choose, and be represented by an advocate, and to be informed of this right promptly.

48. The Legal Aid Act, 2016, at section 43, sets out the duties of the court when interacting with an unrepresented person, and states:

“ A Court before which an unrepresented accused person is presented shall:

- a. Promptly inform the accused of his or her right to legal representation;
- b. substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and
- c. Inform the service to provide legal aid to the accused person.”



49. A cursory look at the proceedings herein clearly shows that the Appellant was not informed of his rights under Article 50(2) (g) of the Constitution. He did not fill in his submissions to explain further his argument.

50. In *Pett vs Greyhound Racing Association* (1968) 2 All ER 545, on right to representation, Lord Denning had this to say

' It is not every man who can represent himself on his own. He cannot bring out the point in his favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man, 'You can ask any questions you like,' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him, and who better than a lawyer who has trained for the task.'

51. In *Karisa Chengo & 2 Others vs. R*, Cr. Nos. 44, 45 & 76 of 2014, the court also stated: -

“It is obvious that the right to legal representation is essential to the realization of a fair trial, more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the *David Njoroge Macharia* case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result, and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death, and such a person is unable to afford legal representation. Under which the trial is compromised in one way or another, only then would the state's obligation to provide legal representation arise.” (Emphasis added)

52. In the instant case, I note that even though the trial court did not inform the Appellant of his right to legal representation, such failure was not fatal or prejudicial to the Appellant’s case as the record shows that he understood the charges brought against him and that he competently cross examined all the prosecution witnesses.

53. It is also noteworthy that the Appellant was not charged with a capital offence whose penalty is death to necessitate the mandatory requirement for legal representation. I find that the trial court conducted a fair trial and that the Appellant did not suffer any injustice due to a lack of legal representation.

54. The other argument by the appellant is that the trial court convicted on evidence that failed to satisfy the requirements of section 36 of the Sexual Offences Act. Like the other grounds discussed above, the appellant has not submitted or elaborated on this ground.

55. Section 36 is about samples being taken from the appellant for forensic or other scientific testing. Section 36 (1) of the Sexual Offences Act provides that -

“ 36. Evidence of medical, forensic and scientific nature

(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 forensic and other scientific testing, including a DNA test, to gather evidence and to ascertain whether or not the accused person committed an offence.

- (2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.
- (3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.
- (4) The dangerous sexual offenders' databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.
- (5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.
- (6) An appropriate sample or samples taken in terms of subsection (5)—
  - a. shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and
  - b. In the case of a blood or tissue sample, it shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.
- (7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against—
  - (a) the State;
  - (b) any Minister; or
  - (c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by



or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both.”

56. A question on section 36 of the *Sexual Offences Act* would arise only where samples were taken from the appellant for forensics or other scientific tests. Were any such samples taken from the appellant herein?
57. It is important to note that the law on Sexual Offences requires that proof be made by the evidence tendered by the prosecution and is not dependent on the examination of the perpetrator.
58. Evidence of the victim is key in sexual offences and the only crucial medical examination is that of the victim to corroborate the fact of defilement or rape as the case may be.
59. In the case of *Fappyton Mutuku Nguv v R (2014) eklr*, where a similar issue of medical examination of the perpetrator was considered, the Court of Appeal stated:

“In our view, such evidence was not necessary, and in any event, the trial court found that there was sufficient medical evidence in support of PW-2’s testimony, which was trustworthy as to the person who had defiled her.”
60. From the trial court record it is evident that the court relied on the medical evidence in support of the prosecution’s case the evidence is sufficient to support the conviction. Medical examination of the appellant was therefore not necessary.
61. The trial court gave very detailed reasons why she believed the testimony of PW1 that she positively recognized the appellant as the person who defiled Accordingly, I find this ground to be devoid of merit. I dismiss it
62. For the reasons stated above, I find that the conviction of the appellant is sound.
63. On the sentence Section 8 (3) provides ‘A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.’
64. The trial magistrate sentenced the Accused person to serve 20 years imprisonment, I find the sentence to be proper and legal for the complainant was aged 14 years old.
65. The upshot of the above is that I find no fault on the part of the trial court for convicting the Accused and sentencing him to serve 20 years imprisonment, I therefore dismiss the appeal on both conviction and sentence. The Lower court’s judgment is upheld.
66. Right of Appeal 14 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF APRIL, 2025**



**S.N MBUNGI**

**JUDGE**

In the presence of :

Court Assistant – Albright Sunguti

