



REPUBLIC OF KENYA



**KENYA LAW**  
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**Moses v Republic (Criminal Appeal E012 of 2022)  
[2025] KEHC 7379 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7379 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL E012 OF 2022  
JK NG'ARNG'AR, J  
MAY 28, 2025**

**BETWEEN**

**PIUS MUGO MOSES ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the Conviction and Sentence in Sexual Offence Case Number 16 of 2019 by Hon. Kabaria L. in the Principal Magistrate's Court in Gichugu)*

**JUDGMENT**

1. 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*. The particulars of the charge were that on 19<sup>th</sup> September 2019 at Njuki-ini Location in Kirinyaga East Sub-County within Kirinyaga County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of A.W.M, a child aged 3 years 10 months.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 19<sup>th</sup> September 2019 at Njuki-ini Location in Kirinyaga East Sub-County within Kirinyaga County, he unlawfully and intentionally caused his penis to come into contact with the vagina of A.W.M, a child aged 3 years 10 months.
3. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case. The trial court found that the Prosecution had proved a prima facie case against the Appellant and put him on his defence. The Appellant gave sworn testimony and called one witness in aid of his defence.
4. In a Judgement dated 3<sup>rd</sup> June 2022, the trial court found the Appellant guilty of the offence of defilement, convicted him and sentenced him to serve 20 years imprisonment.



5. Being aggrieved with the Judgment of the trial court, the Appellant, Pius Mugo Moses through a Petition of Appeal dated 5<sup>th</sup> July 2022 appealed against his conviction and sentence on the following grounds reproduced verbatim: -
- I. That the learned trial Magistrate erred in law and fact in failing to make a finding about the inconsistent testimonies about the nature of the alleged discharge from the minor's private parts and the erroneous conclusion about penetration.
  - II. That the learned trial Magistrate erred in law and fact in failing to make a finding that the minor's evidence was inconsistent and unreliable which would have required corroboration before convicting.
  - III. That, the learned trial Magistrate erred in law and fact in not considering the evidence of the minor that all through she had her clothing on, erred in making a finding that her inner wear was not clothing and considered extraneous issues which clouded her evaluation of the evidence tendered.
  - IV. That the learned trial Magistrate erred in law and fact in failing to consider the character of the minor as a hyper active one and that her activities in the course of the day or while mounting the motorcycle could have caused some discomfort to her private parts, thus jerked while being washed.
  - V. That the learned trial Magistrate erred in law and fact in making a finding that the evidence of the minor did not exclude the Appellant while being cross-examined, yet it's the victim who ought to lead evidence as to the culpability of the Accused.
  - VI. That the learned trial Magistrate erred in law and fact in failing to accord the required consideration the evidence of the minor concerning other male persons who allegedly had some contact with her and used the same words used in description of what the Appellant did to her, thus raising an influence of a coached witness.
  - VII. That the learned trial Magistrate erred in law and fact in failing to consider the evidence of the clinical officer as just an opinion and evaluate the same together with the evidence adduced by the other Prosecution's witnesses.
  - VIII. That the learned trial Magistrate erred in law and fact in failing to consider the findings that there were no physical injuries on the vagina and that the other outer genitalia was normal yet made a finding of penetration for the mere reason of a broken hymen.
  - IX. That the learned trial Magistrate erred in law and fact in not giving due consideration to the evidence of the Appellant and his witness.
  - X. That the conviction was against the weight of the evidence adduced and the applicable legal principles.
6. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh and come to my own conclusion. I now proceed to consider in summary, the case before the trial court and the parties' submissions in the present Appeal.

### **The Prosecution's Case.**

7. It was the Prosecution's case that the Appellant defiled A.W.M (PW1) on 19<sup>th</sup> September 2019. PW1 testified that on the material day, the Appellant lured her to his house and did bad manners to her.



PW1's grandmother (PW2) and neighbour (PW3) testified that they saw a whitish discharge from the victim's genitalia as she was about to be bathed.

8. James Kariuki Ombati (PW5) who was the clinical officer stated that he examined the victim (PW1) and found that she had an inflammation on her labia majora and minora and that her hymen was freshly broken. PW5 further testified that he also found epithelial cells and it was his conclusion that PW1 had been penetrated.
9. At the time of writing this Judgement, the Prosecution's submissions on the Appeal were not on record.

### **Appellant's Case**

10. The Appellant, Pius Mugo Moses (DW1) denied committing the offence. He testified that on the material day, upon being asked by his brother Patrick Muchira to buy wheat flour, he proceeded to buy the said flour from PW2's (CK) shop. He further testified that after he bought the flour, the victim (PW1) boarded his motorcycle and PW2 asked him to go with the victim.
11. It was DW1's testimony that when he got home, he helped his brother and friend knead flour in the kitchen and the victim joined them in the kitchen and sat by the door. It was his further testimony that after he finished kneading, he washed his hands, gave the victim one chapati and left with the victim back to her grandmother's (PW2) house. DW1 testified that at no time did he enter his house with the victim.
12. Brian Macharia (DW2) testified that he was the Appellant's brother and that on the material day, the Appellant came with the victim to the kitchen carrying wheat flour. DW2 stated that the Appellant did not go with the victim to the house and after they were done kneading, they gave the victim a chapati and he saw the Appellant leave with the victim on his motorcycle.
13. Through his written submissions dated 21<sup>st</sup> March 2025, the Appellant submitted that the Prosecution failed to discharge its burden of proof and that the Prosecution's case was fabricated and full of inconsistencies. That the victim appeared to be coached. He relied on *J.M v Republic* (2021) eKLR.
14. It was the Appellant's submission that the clinical officer testified that a broken hymen was not conclusive proof of penetration and he relied on *P.K.W v Republic* (2012) eKLR and *Gregory Mawira Mbae v Republic* (2021) eKLR. It was his further submission that his defence and that of his witness was not shaken after cross examination and further that the victim's evidence was not corroborated.
15. The Appellant submitted that his conviction was therefore unsafe.
16. I have gone through and considered the trial court's proceedings, the Petition of Appeal dated 5<sup>th</sup> July 2022 and the Appellant's written submissions dated 21<sup>st</sup> March 2025. The following issues arise for my determination: -
  - i. Whether the Prosecution proved its case beyond reasonable doubt.
  - ii. Whether the Appellant's defence placed doubt on the Prosecution case.
  - iii. Whether the sentence preferred against the Appellant was just and fair.

#### **i. Whether the Prosecution proved its case beyond reasonable doubt.**

17. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.



18. On the issue of age, CK (PW2) who was the victim's grandmother testified that at the time of the commission of the offence, the victim was aged 3 years old. The clinical officer (PW5) also produced a P3 Form as P. Exh 2 which indicated that the victim was three and a half years old. PW5's testimony on the victim's age was uncontroverted after cross examination. In Mwalengo Chichoro Mwajembe v. Republic, Msa. App. No. 24 of 2015 (UR), the Court of Appeal held: -

“ .....the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v Republic*, Criminal Appeal No. 19 of 2014 and *Omar Uche v Republic*, Criminal Appeal No. 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond reasonable doubt. This form of proof is a direct influence by the decision of the Court of court Appeal of Uganda in Francis Omuroni is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable.....”

19. It is salient to note that the trial court declared the victim (PW1) a vulnerable witness on account of her age. The court ordered her mother, MW tomcat as the victim's intermediary in the proceedings. MW told the trial court that at the time the offence was committed, PW1 was aged 3 years old. Bearing this in mind and the testimonies of PW2, PW5 and the victim's mother regarding the age of the victim, it is my finding that PW1 was aged 3 years at the time of the commission of the offence.
20. With regard to penetration, Section 2 of the Sexual Offences Act defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.
21. Penetration can be proved through the evidence of the victim corroborated by medical evidence. It should however be noted that if the medical evidence is insufficient, courts can convict solely on the evidence of a victim provided they believe the testimony of the victim and record such reasons.
22. In the instant case, I proceed to carefully evaluate the victim's testimony and the medical evidence tendered in the trial court.
23. From the evidence on record, there was no eye witness to the commission of the offence. However, the court can use the sole testimony of the victim as a basis for conviction. Section 124 of the Evidence Act provided: -

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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 offence, 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

24. I have carefully gone through the victim's (PW1) testimony. She testified that on the material day, the Appellant took him to his house and did bad manners to her and he later took her back to her



grandmother's (PW2) house. For victims of defilement who are of tender years, courts have accepted the use of the words "bad manners" or "tabia mbaya" as definitions of defilement. In the case of *Muganga Chilejo Saba v Republic* [2017] KECA 359 (KLR), the Court of Appeal held: -

"Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms such as "alinifanyia tabia mbaya".

25. Having considered the victim's testimony as a whole, I have no reason to disbelieve her. I say so because the victim was able to vividly narrate to the trial court how the Appellant defiled her and pointed to her genitals while narrating the ordeal.
26. Regarding medical evidence, James Kariuki Ombati (PW5), a clinical officer at Kianyaga Sub-County Hospital testified that he examined the victim (PW1) and found that she had a freshly broken hymen and an inflamed labia and majora. PW5 further testified that he found epithelial cells and no spermatozoa. It was his conclusion that based on his examination, the victim had been penetrated. PW5 produced the victim's treatment notes, P3 Form, Lab Request and Report and PRC Form as P. Exh 1, P. Exh 2, P. Exh 3, P. Exh 3 and P. Exh 4 respectively. I have looked at the exhibits and their contents mirror and corroborated the clinician's testimony and conclusion of penetration and I accept the medical evidence presented by PW5 that there was penetration.
27. The Appellant submitted that a broken hymen was not conclusive proof of penetration. In addition to the provisions of section 2 of the *Sexual Offences Act* stated earlier in this Judgment, the Court of Appeal in *Serem v Republic* [2023] KECA 30 (KLR) held: -

"The place of Penetration in sexual offences was elaborated in this Court's decision in *Erick Onyango Ondeng' v Republic* [2014] eKLR, relied on by the respondent, in which this Court quoted with approval the Uganda Court of Appeal decision in *Twehangane Alfred v Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6, as follows:

"in sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

28. Flowing from the above and in consonance with the provisions of section 124 of the *Evidence Act* that the victim's testimony must be corroborated by other material evidence, it is my finding that the clinician's (PW5) evidence buttressed the victim's (PW1) testimony that she was penetrated. The medical evidence confirmed the presence of a freshly broken hymen, presence of epithelial cells and the inflamed labia and majora which was indicative of the act of penetration. It is therefore my further finding that the victim was penetrated on the material day.
29. With regard to the issue of identification, the victim (PW1) testified that the Appellant did bad manners to her. The victim's grandmother, CK (PW2) testified that on the material day, the Appellant carried the victim away in his motorcycle and the Appellant later came back with the victim to her shop. This testimony was corroborated by the Appellant (DW1) and Brain Macharia (DW2) who all testified that the Appellant was with the victim in their kitchen and that after handing the victim a chapati, the Appellant took her back to her grandmother. The victim's grandmother testified that she knew the Appellant as he was a boda boda rider and the Appellant testified that he knew the victim



and her grandmother. In my view, the victim (PW1), grandmother (PW2) were not strangers as they knew one another. This was evidence of recognition.

30. As to the Appellant's positive identification, the victim testified that it was "Piu" who defiled her. The Appellant latched on the victim's contradiction when she was cross examined when she stated that Patrick Macharia or Brian Macharia could have "injected" her in her stomach, meaning defiling. However, when the victim was re-examined, she was adamant that between Patrick Macharia, Brian Macharia and the Appellant, it was the Appellant who defiled her. Further, the Appellant's (DW1) and Brian Macharia's (DW2) testimonies indicated that the Appellant was the last person seen with the victim before he (Appellant) took her to her grandmother's shop.
31. Th grandmother (PW2) testified that after closing her shop, she went to bath the victim and that is when she discovered a whitish discharge from the victim's vagina. The sequence of this events leaves this court with no doubt that it was the Appellant to the exclusion of anyone who defiled the victim. The victim's testimony on identification was cogent and believable and the Appellant's and DW2's testimonies revealed that the Appellant was the last person seen with the victim before she was taken back to her grandmother's shop. There was no possibility of mistaken identity. It is therefore my finding that the Appellant was positively identified as the perpetrator of the offence.
32. Based on the totality of the evidence before me, it is my finding that the Prosecution satisfactorily established the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

#### **ii. Whether the Appellant's defence placed doubt on the Prosecution's case.**

33. The Appellant (DW1) denied committing the offence. His testimony and that of Brain Macharia (DW2) have been aptly captured earlier in this Judgement.
34. Having analysed the Appellant's and DW2's defences, it is my finding that both testimonies were mere denials and only described the circumstances in the kitchen as they kneaded flour for chapati. None of the testimonies could displace the victim's testimony that the Appellant defiled her. It is my finding that the Appellant's defence was weak and as a whole, did not cast any doubt on the Prosecution's case which I have already found proven.

#### **iii. Whether the sentence preferred against the Appellant was just and fair**

35. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles and can only interfere with a sentence if it is demonstrated that the trial court acted on the wrong principle, ignored material factors, took into account irrelevant considerations or on the whole that the sentence was manifestly excessive.
36. The penal section for this offence is found in section 8(2) of the [Sexual Offences Act](#) which states that: -

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
37. Having considered the circumstances of the case, it is my finding that the trial court was lenient in issuing a 20-year sentence. The age of the victim (3 years old) was in itself an aggravating factor which would have necessitated a stiffer sentence. However, in light of the Prosecution's failure to serve a notice of enhancement of sentence, my hands are tied. In the circumstances thereof, it is my finding that the 20-year-old sentence was reasonable and there was no reason for this court to interfere with it.



38. In the end, the Petition of Appeal dated 5th July 2022 has no merit and is dismissed.

**JUDGEMENT DATED AND SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF MAY, 2025.**

.....

**J.K.NG'ARNG'AR**

**JUDGE**

Judgement delivered in the presence of Nyaga for the Appellant and Mamba for the Respondent. Siele/Mark (Court Assistants).

