



REPUBLIC OF KENYA



KENYA LAW
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**Mukenda v Republic (Criminal Appeal E007 of 2025)
[2025] KEHC 6950 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E007 OF 2025
JK NG'ARNG'AR, J
MAY 28, 2025**

BETWEEN

GEOFFREY WAMALWA MUKENDA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. GWM, the appellant herein, 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 offence were that on diverse dates between March 2022 and April 2022 at Kirinyanga County, the appellant intentionally caused his penis to penetrate the vagina of HWA a child aged 11 years. The appellant faced an alternative count of indecent act contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between March 2022 and April 2022 at Kirinyanga County, the appellant intentionally touched the vagina of HWA a child aged 11 years with his penis against her will.
2. The appellant was arraigned before the trial court where he pleaded not guilty to both counts. After full trial, the appellant was convicted of the offence of defilement and sentenced to life imprisonment.
3. Aggrieved by those findings, the appellant filed his undated petition of appeal challenging the learned magistrate's findings on the following grounds: the ingredients to the offence of defilement were not proved beyond reasonable doubt; and the prosecution's case was marred with contradictions rendering the conviction unsafe. For those reasons, the appellant prayed that his appeal be allowed in its entirety.
4. The appeal was canvassed by way of written submissions. The appellant, in his written submissions dated 12th March 2025, argued that the charge sheet was defective as it failed to set out that the alleged acts were unlawful. On plea taking, the appellant attacked the same presenting that the trial court ought to have inquired from him whether he understood Swahili as he is of Abaluhya origin. He questioned the credibility of PW2 who stated in evidence that she did not know who was responsible



for the complainant's pregnancy. He continued that his right under Articles 50 (2) (g) and (h) of *the Constitution* were violated as he was not promptly informed of his right to legal representation.

5. On the age of the complainant, he submitted that there was a discrepancy when looking at the charge sheet against the evidence of the investigating officer. On this ground, it argued that the prosecution did not discharge its burden of proof to the required standard. He also questioned the credibility of PW6. Regarding the DNA samples collected, the appellant decried that they were collected without the presence of his representative. That oversight rendered that evidence unsafe for consideration. Lastly, on the sentence meted out, the appellant complained that the mandatory life sentence was harsh and excessive. He urged this court to reconsider the sentence taking into account the period that he had already spent in custody. He thus prayed that this appeal be allowed.
6. Opposing the appeal, the respondent relied on its written submissions dated 18th March 2025 to argue that all the ingredients to the offence of defilement, that is; the age of the complainant, the aspect of penetration and the identity of the perpetrator were proved beyond reasonable doubt. Looking at the evidence on record, it submitted that the appellant failed to furnish evidence corroborating his defence merely denying the offence. It therefore concluded that it was properly rejected. Lastly on the sentence, it submitted that the same was lawful. It conceded that the same could be meted out to 30 years imprisonment.
7. As a first appellate court, I am called upon to re-consider, re-evaluate and re-analyse the evidence before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See *Erick Onyango Ondeng' vs. Republic* [2014] KECA 523 (KLR).
8. In cases of defilement, the prosecution is called upon to establish the following three crucial conjunctive ingredients: the age of the complainant, penetration and the identity of the assailant. In determining the merits or otherwise of this appeal, I shall reconsider the evidence while establishing whether the prosecution discharged its burden of proof as found by the trial court. That is the main issue for determination.
9. The Complainant HWA PW1 testified that she was born on 29th September 2011. At the time of her testimony, she was 11 years of age. She recognized the appellant as her step father who lived with his mother RMG. He was working as a watchman at the time of the offence.
10. PW1's evidence was that she was living with her grandmother PW2 Ann Wangeci at all material times. On one day, the appellant called her but she refused to go. During that night, the appellant opened the door with a spare key. Her mother was not at home. He then lowered her trouser and sexually assaulted her. She felt pain. After he was done, the appellant threatened that if she disclosed what had transpired, he would kill her. She recalled that on the eve before the offence was committed, the appellant chased away her biological mother leaving her together with her sister under the care of the appellant.
11. The following morning, PW1 took a shower and went to school. When she came back home, the appellant committed the offence once more. He did this on three consecutive days. Later on, PW1's belly began to grow prompting PW2 to take her to hospital. That was when they found out that the complainant was pregnant. The matter was reported at the police station and the chief. PW1 would then give birth on 11th January 2023 to a baby boy. She stated that her education and life had been greatly affected since then.
12. PW2 confirmed that the appellant was living with her but had formerly lived with the appellant and her mother. She learned that the appellant and her daughter differed prompting her to desert the home. She also left her children with the appellant. It was in December 2022 that she noticed that PW1 had a bulging stomach during the school holidays. She took her to hospital and that was when she discovered



- that she was pregnant. At first, and out of fear, PW1 did not disclose who was responsible. With more persuasion, the complainant informed her that it was the appellant that had sexually assaulted her. He was later on arrested. She stated that her date of birth was 18th September 2011.
13. PW3 Mercy Wambui Muchira's evidence was that as the chief of the area, she received a phone call on 20th December 2022 from IP Kilonzo that PW1 was pregnant. She met PW1 and PW2 and handed over the case to IP Kilonzo.
 14. PW4 PCW Stella Mwa working at PI police post, was the investigating officer assigned this matter. She received a call on 27th November 2022 from IP Kilonzo Mbithi that the complainant had been defiled. She then conducted investigations, interrogated the witnesses, collected the evidence and arrested the appellant. According to PW4's analysis of the birth certificate, the minor was 12 years at the time of the offence as she was born on 18th September 2011. She produced the minor's birth certificate and the exhibit memo as evidence.
 15. PW5 Government Analyst Pamela Oketch produced the report dated 10th August 2023 authored by her colleague Nelly Papa. She had worked for over 20 years with PW5 and could therefore recognize her handwriting and signature. She testified that they received the exhibit memo from the police on 24th July 2023 accompanied together with the appellant and PW1's child. The request was to establish the DNA of the two subjects. PW5 stated that from the analysis, the appellant had a 99.9% chance that he was the father of the child. The report was produced in evidence.
 16. PW6 George Kariuki a clinician working at Kimbimbi Hospital produced the complainant's ultrasound report and OP card together with the PRC and P3 forms and were produced in evidence. He adduced them on behalf of the author Francis Omondi who was away on leave. He recognized his handwriting and signature. On 7th December 2022, after collecting the history of the complainant, PW1 was taken to an ultrasound. It was confirmed that her abdomen was distended. Fundal height was 32 weeks. The foetus had a heartbeat. She was referred to the clinic.
 17. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was placed on his defence. However, the appellant elected to remain silent and leave the matter to court.
 18. Starting with the age of the complainant, the birth certificate produced in evidence indicated that the minor was born on 18th September 2011. The offence was reported to have occurred on diverse dates in March and April 2022. Going by that assessment, I do confirm that from the birth certificate that the age of the minor was established as below the age of 11 years at the time of the offence. As rightly stated by the trial court, the minor had not attained the age of 11 years.
 19. On penetration, it cannot be denied that the complainant gave birth to a baby boy on January 11th 2023. The ultrasound similarly found that the complainant was 32 weeks pregnant as at 7th December 2022. Section 2 of the *Sexual Offences Act* defines penetration to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. I therefore come to the conclusion that penetration was proved beyond reasonable doubt.
 20. What of the identity of the perpetrator? PW1's evidence was that on three consecutive days, the appellant had sexual intercourse with her. He then threatened to kill her if she did not tell anyone. If it was not for her growing belly, this offence would not have been discovered by PW2 who was the complainant's guardian. On being seen by PW5's colleague, it was established that the appellant had a 99.9% chance that he was the father of the child. The report was produced in evidence. PW1 was well known to the appellant. There was no case of mistaken identity. The DNA furthermore sealed the prosecution evidence as to concluded beyond a shadow of doubt that the appellant was the assailant.



21. On whether the evidence of the prosecution was vitiated by the absence of the appellant's representative during the taking of samples for DNA, the appellant has not demonstrated how his rights, if any, were violated. The appellant was escorted for DNA sampling following a court order. If he wanted a representative, nothing stopped him from appointing out. That argument fails and is accordingly dismissed.
22. On whether the charge sheet was defective as it failed to set out that the alleged acts were unlawful, it is clear that the appellant understood that he had been arrested and charged with a criminal offence. It was inconsequential whether the particulars of the offence indicated that the act was unlawful. After all, a charge sheet contained an offence and particulars that are manifestly unlawful on the face of it.
23. On whether the court ought to have considered that the appellant was Abaluhya, I have perused through the lower court record. During his plea taking, the substance of the charge and every element thereof was read over and explained to the appellant in Swahili to which he responded. He did not raise any objection regarding that process. He also did not inform the court that he did not understand Swahili which is an official language of the court. The appellant clearly understood what he was charged. This is why an unequivocal plea of not guilty was entered on both counts. I therefore find that the said argument is an afterthought and must fail.
24. The appellant lamented that his right under Articles 50 (2) (g) and (h) of *the Constitution* were violated as he was not promptly informed of his right to legal representation. In the decision of the Court of Appeal in *Manyeso vs. Republic* [2023] KECA 827 (KLR), the Court held as follows:

“This court (Kairu, Mbogholi-Msagha and Nyamweya JJA) held in *William Oongo Arunda* (Hitherto referred to as Patrick Oduor Ochieng) *v Republic (Criminal Appeal 49 of 2020)* [2022] KECA 23 (KLR) 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, the appellant did not raise the issue of legal representation either in the trial court and the High Court, and the record of the trial court shows that the appellant participated in the trial and cross-examined the witnesses, and it is not evident that he suffered any or any substantial injustice. For these reasons, we do not find any merit in the appellants arguments that their rights to a fair trial on under articles 50(2)(g) and 50(2) (h) of *the Constitution* were violated.”
25. Rightfully so, the trial magistrate did not inform the appellant of his right to legal representation. Gathered by the above binding authority, the appellant has not demonstrated how substantial injustice was occasioned by the absence of being notified of his right to legal representation. In any event, the appellant cross examined several witnesses. I do not find any substantial injustice that was occasioned. That argument must fail.
26. The appellant took advantage of the complainant's mother's desertion. He repeatedly sexually assaulted her. As a consequence, the minor became pregnant and out of necessity, had to drop out of school to fend for her baby and adopt to the new reality of being a mother when she was still a minor. Certainly, this has derailed the complainant's progress in life including her education. She was only ten years old. The appellant deserves no mercy. In any event, he has not shown any remorse. I find that the appeal against his conviction lacks merit and it is hereby dismissed.



27. On sentencing, the appellant was sentenced to life imprisonment under section 8 (2) of the *Sexual Offences Act*. The said provision provides that a convicted person shall be imprisoned for life. The provision is couched in mandatory terms. Recently, our apex court in the case of Republic vs. Joshua Gichuki Mwangi, Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) and affirmed in Republic vs. Manyeso [2025] KESC 16 (KLR) held that the mandatory sentence provided therein is lawful. Accordingly, the appeal against the sentence lacks merit and it is hereby dismissed.

It is so ordered.

JUDGEMENT DATED AND SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY, 2025.

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J.K.NG'ARNG'AR

JUDGE

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

