



**Muriuki v Republic (Criminal Appeal E034 of 2024)
[2025] KEHC 7362 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E034 OF 2024
JK NG'ARNG'AR, J
MAY 28, 2025**

BETWEEN

FRANCIS WACHIRA MURIUKI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. 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 4th March 2017 at Kirinyaga Central sub county within Kirinyaga County, the appellant intentionally caused his penis to penetrate the vagina of SMM a child aged 6 years old. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that 4th March 2017 at Kirinyaga Central sub county within Kirinyaga County, the appellant caused his penis to come in contact with the vagina of SMM a child aged 6 years.
2. The appellant pleaded not guilty when he was arraigned to take plea. After full trial, the appellant was convicted of defilement and sentenced to life imprisonment. The appellant is aggrieved. He filed grounds of appeal dated September 2024 (sic). The appellant prayed that his appeal be allowed on the following summarized grounds: the evidence of the prosecution was replete with contradictions, inconsistencies and incredibility; the charges preferred against him were premised on malice and the existence of a grudge; the prosecution failed to discharge its burden of proof to the required standard; his defence was not considered; and the sentence meted out was harsh and excessive. For those reasons, he prayed that the conviction be quashed and the sentence be set aside to enable him be set at liberty.
3. The appeal proceeded for hearing by way of written submissions. The appellant's written submissions dated 14th March 2025 submitted that the evidence of the prosecution was marred with inconsistencies as follows: firstly, PW1 could not identify the perpetrator of the victim. Secondly, PW1 did not state



that she was incessantly going to the toilet yet PW6 testified as such. Lastly, there were contradictions between the evidence of PW1 and PW2. He pointed out that penetration was not proved beyond reasonable doubt in light of the medical evidence adduced. In any event, his samples were not taken as to ascertain that he was the perpetrator. That PW8 did not conduct sufficient investigations. He urged this court to consider his defence which was cogent. Finally on sentence, he submitted that it was harsh and unlawful.

4. The respondent opposed the appeal. In its written submissions dated 17th March 2025, it submitted that the prosecution had proved beyond reasonable doubt that the appellant was properly convicted. It continued that the testimonies of the witnesses corroborated that of the victim and therefore, there were no inconsistencies, contradictions or lack of credibility in the evidence. It denied that the charges were preferred on account of malice adding that there was no grudge between the appellant and the complainant's family. That all crucial witnesses testified and the medical evidence left no doubt that the offence was committed. Finally, the appellant's defence was considered and properly rejected and the sentence meted out was lawful. It prayed that the appeal be dismissed.
5. As a first appellate court, I am duty bound to re-evaluate, re-consider and re-analyse the evidence on record and arrive at my own independently conclusion. In so doing, I must bear in mind that I did not have the advantage of seeing the witnesses and hearing them give their testimony. [See Okeno vs. Republic (1977) EA 32].
6. According to the record before me, the prosecution called eight witnesses whose evidence is captured as follows: PW1 SM testified when she was 12 years of age. She was born on 11th January 2011. She was a class seven student at [particulars withheld] Primary School. She was initially living with her mother SN PW2 but later lived with her grandmother PW3 Jane Wanjiru.
7. One morning, PW1 was sent to the shop by her aunt [particulars withheld] to buy sugar. On her way back, she met the appellant at the gate to his house. He then took PW1 to his house and sexually assaulted her. She didn't disclose what had transpired. instead, the following day, she went to school and met her teacher Mrs. Mutei who took her to hospital after she disclosed to her what had transpired. She maintained that she did not go to the toilet. She testified that she was taken to the police station.
8. PW2 confirmed that PW1 was her daughter born on 11th January 2011. She confirmed that she lived with PW1 and that PW1 was living with PW3 at the time of the offence. She recalled that on 5th March 2018, PW1's teacher noticed that PW1 was unwell. That she was taken to Gathambi Dispensary and later Kerugoya General Hospital. She was then informed that her child had been defiled by the appellant who was their neighbour.
9. PW2 went to her daughter on receiving the news. She observed that she had a whitish discharge on her vagina and she was dirty. That she could not sit properly. She recalled that the appellant had also been charged and convicted with defiling his other daughter called CW. She denied that the family had any dispute with the appellant.
10. PW3, the complainant's grandmother testified that the complainant was defiled on Sunday 5th March 2018. The following day, PW3 bumped into Mrs. Mutei in town. She informed her that she had taken PW1 to hospital as she was unwell. She had left the minor at the hospital. PW3 went to Gathambi Dispensary and found the child in the company of three doctors. That was when PW1 disclosed that she had been defiled by the appellant whom she recognized as their neighbour. The doctor then filled a document and they later went to hospital. PW3 then informed PW2 who took the complainant to Kerugoya Hospital.



11. PW3 recalled that PW1's vagina was swollen. She was crying and was unable to sit down. She preferred to lie down. She also cried when she was urinating. She then recorded her statement at the police station. She confirmed that she was a witness in a case filed against the appellant concerning PW1's sister CW. That it was her mother who prepared PW1 for church. She denied that there was any land dispute between the family and the appellant.
12. PW4 EW, PW2's sister and PW1's aunt stated that she met her mother PW3 at Kabonge shopping centre. She was informed by PW3 that she was asked to take the minor to the hospital having left Kabonge Police Station. PW1 was in school earlier that day. She then took the child to hospital and then returned her back to PW3. She confirmed that she was told that the appellant defiled her on her way to the shop. She recognized the appellant as their neighbour. She denied that there was any grudge that existed.
13. PW5 Benard Wanjohi Githaka a clinician at Kerugoya County Referral Hospital testified that PW1 walked into their facility on 6th March 2018 with an outpatient card and treatment note dated 5th March 2018; She examined PW1's genitalia and noted that she had mild bruises and a smelly discharge. He produced his colleague's P3 form in evidence together with the treatment notes and lab request. He concluded that the complainant had been defiled. He estimated the injuries to have been inflicted 48 hours before he saw the complainant.
14. PW6 Ivy Lucy Wanjau alias Mrs. Mutei confirmed that she was a teacher at Gathambi Primary School. Her evidence was that on 5th March 2018, she noticed that PW1 was constantly going to the washroom. Concerned for her health, she informed the headteacher requesting for permission to escort the minor to Gathambi Dispensary. She found a nurse who remained with the minor. The nurse was to call PW3 who was her guardian. She then went back to school maintaining that she did not meet anyone on the way. She revealed that she recorded her statement on 3rd April 2023. She did not know how the family discovered about the offence. She never talked to PW3 and did not tell her about what had happened.
15. PW7 Susan Gichuju Mugo a retired nurse previously working at Gathambi Health Centre, testified that on 5th March 2018, she was on duty when PW1 was brought into the facility by PW6. It was indicated that PW1 was walking in a funny gait and had pain while urinating. After obtaining PW1's testimony stating that she had been defiled by the appellant on 4th March 2018, she asked PW1 to lie in bed. She noticed that PW1 was afraid of lying on the bed and PW7 reassured her. She observed that PW1's vulva was inflamed and she was in pain. There was a foul smell. She was later referred to Kerugoya County Referral Hospital. Her evidence was that they were planning to call her grandmother who came stating that she had met PW6. She produced the complainant's treatment notes.
16. PW8 PC Peter Kibue working at Kerugoya Police Station took over as the investigating officer from his predecessor. He recalled that this matter was actually heard in Criminal Case (SO) No. 5 of 2018. However, since the victim failed to adduce evidence, the trial court discharged the appellant under section 87 (a) of the Criminal Procedure Code. The file was returned to the station with the complainant's family complaining that justice was not served.
17. PW8 together with his colleague wrote to the ODPP on 16th March 2022 that the minor had undergone guidance and treatment to help her overcome the trauma. She was now ready to testify in court. That prompted the appellant to be rearrested and arraigned in court. He relied on the evidence collected and the statements of the witnesses recorded to form the opinion that the appellant had been properly arrested for committing the offence. He produced the minor's birth certificate confirming that she was born on 11th January 2011. He produced the correspondence regarding the minor's progress and her ability to testify in court. He also clarified that the PRC form had been misplaced.



18. 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. His evidence was that he had gone to visit his sister in Ngorano on 3rd March 2018 as her husband was unwell. He slept over and only left for his place at 5:00 p.m. He was therefore of the opinion that he had been framed because he disagreed severally with the complainant's family. He recalled that he was acquitted in criminal case (SO) no. 11 of 2017 for allegations of defiling his sister.
19. He recalled that these proceedings began in Criminal Case (SO) No. 5 of 2018 but was withdrawn under section 287 (a) of the *Criminal Procedure Code* and was revived herein. He maintained that if indeed he defiled the complainant, he would have been caught as anyone leaving the game of his home could be seen. There was only one piece of land separating the complainant's home and the appellant's home. That if she screamed, she would have been heard. He was arrested in the shamba. He denied that he committed the offence. He testified that PW7 was the complainant's relative.
20. The appellant also called DW2 Eunice Muthoni Mwangi to the stand. She confirmed that the appellant was her brother. She confirmed that the appellant visited her on 3rd March 2018. She was with her husband. That he left her house the following day, which was a Sunday, at 5:00 p.m. she confirmed that they all spent that weekend together. She confirmed that her husband passed on as he was very sick.
21. The following ingredients have to all be established in order for the court to sustain a conviction for the offence of defilement: the age of the complainant, penetration and the identity of the perpetrator. On the minor's age, PW1's birth certificate confirmed that the minor was born on 11th January 2011. PW1 testified as such and her mother PW2 confirmed her date of birth affirmatively. I therefore find that the age of the minor was 6 years old at the time of the alleged offence.
22. On penetration and whether it was the appellant, 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. PW5 testified that on examination, the complainant's genitalia had mild bruises and a smelly discharge from the P3 form. He estimated the injuries to have been inflicted 48 hours before he saw the complainant. PW7 in her evidence, testified that the minor's vulva was inflamed and she was in pain. There was a foul smell. However, the PRC form was adduced in evidence purported to have been lost.
23. It is also critical to point out at this juncture that section 124 of the *Evidence Act* provides that an accused person shall not be liable to be convicted on the evidence of the alleged victim without corroboration provided that in cases involving a sexual offence, the only evidence of the alleged victim shall be received without corroboration and can convict the accused person if the court is satisfied that the alleged victim is telling the truth.
24. PW1 testified that one morning, she was sent to the shop by her aunt [particulars withheld] to buy sugar. On her way back, she met the appellant at the gate to his house. He then took her to his house and sexually assaulted her. She didn't disclose what had transpired. Instead, the following day, she went to school and met her teacher Mrs. Mutei who took her to hospital after she disclosed to her what had transpired. She maintained that she did not go to the toilet. Looking at PW1's evidence, she does not disclose whether or not she was in pain after the ordeal and that she was walking with a funny gait. She also did not disclose about going to church that day, a sharp contrast from PW2 and PW3's evidence.
25. It is also instructive to note that PW3 was emphatic that the offence took place on 5th March 2018 which happened to be on a Sunday. However, the charge sheet indicates that the minor was assaulted on 4th March 2018. Interestingly, PW2 testified that PW6 noticed that her daughter was unwell when she was in school on 5th March 2018.



26. PW3 Furthermore stated that she bumped into PW6 in town. That PW6 informed her that the minor was unwell and was receiving treatment at Gathambi Dispensary. That was when she was notified that the complainant had been defiled. PW3 then informed PW2 who took the complainant to Kerugoya Hospital.
27. According to PW3, the complainant was crying and was unable to sit down. She was also crying when she was urinating. If PW3's evidence was anything to go by, then it would have been apparent to immediately observe or note significant changes in the minor's behavior and walking style. However, that was not the case. If the minor was indeed assaulted on 4th March 2028, I think the first person who would have noticed it was PW3. She further recalled that it was PW2 who prepared PW1 for church; a fact that was not corroborated by PW2. She also denied the existence of a grudge.
28. PW4's evidence was that she met her mother PW3 at Kabonge shopping centre. She was informed by PW3 that she was asked to take the minor to the hospital having left Kabonge Police Station. However, PW3 did not testify as such. She did not mention that she went to the police station and then informed PW4.
29. PW6 testified that on 5th March 2018, she noticed that PW1 was constantly going to the washroom. This was not corroborated by PW1 who in fact denied that she was going to the washroom incessantly on that day. Concerned for her health, she informed the headteacher requesting for permission to escort the minor to Gathambi Dispensary. She found a nurse who remained with the minor. The nurse was to call PW3 who was her guardian. She then went back to school maintaining that she did not meet anyone on the way. Interestingly, PW3 gave conflicting evidence stating that she was notified by PW6 that the minor was in hospital. Yet PW6 maintained that she never talked to PW3 and did not tell her about what had happened.
30. The above contradictions in my view do not create a chain of events that is believable. I am not satisfied that there was an element of truth in the prosecution's evidence. In any event, I find it very suspicious that PW6 only recorded her statement on 3rd April 2023; about five years after the offence took place. The evidence of the minor was too scanty as to make a conclusion that she was defiled; let alone by the appellant.
31. If indeed the complainant was in excruciating pain, as the prosecution's witnesses purported to point out, the complainant would have been in that condition soon after the incident. There are so many loopholes that demonstrate that the production's case was not watertight. Surely, a conviction cannot be sustained in the circumstances. The appellant put it to several witnesses that they framed the charges against him. I am persuaded that the appellant was charged to square out a grudge. He gave an alibi defence which I find satisfactory and shakes the prosecution's evidence.
32. Furthermore, the medical evidence is not satisfactory. In this case, it is not clear if the minor's hymn was torn. Though the injuries were estimated to be 48 hours, I am in doubt as to whether they were brought about by penetration or sexual assault for that matter. In any event, the PRC form was not adduced in evidence. That would have perhaps conclusively sealed that there was penetration.
33. In view of the foregoing, I find that the conviction rendered against the appellant was not safe. Accordingly, the appellant's appeal must succeed. His conviction is quashed and substituted with an order acquitting him. His sentence is furthermore set aside. I direct that the appellant shall be immediately released from custody and be set at liberty unless otherwise lawfully held.

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 Ndungu for the Appellant and Mamba for the Respondent.
Siele/Mark (Court Assistants).**

