



REPUBLIC OF KENYA



KENYA LAW
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**Mugendi v Republic (Criminal Appeal E025 of 2024)
[2025] KEHC 11677 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E025 OF 2024
SM GITHINJI, J
JULY 31, 2025**

BETWEEN

PATRICK MUGENDI APPLICANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Ruling of Hon. D.W. NYAMBU (C.M) in Meru
Criminal Sexual offence No. E051 of 2022 delivered on 17/01/2024)*

JUDGMENT

1. PATRICK MUGENDI the Appellant herein was charged in the lower court with a main count of defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of this offence are that on the 29th day of September 2022 at [Particulars withheld] Village, Ntugi Location in Buuri East Sub-County within Meru County, the appellant intentionally caused his penis to penetrate the vagina of J.K a child aged 13 years.
3. In the alternative, the appellant faced a charge of committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.
4. The particulars hereof being that on the 29th day of September, 2022 at [Particulars withheld] Village, Ntugi Location in Buuri East Sub-county within Meru County, the appellant intentionally touched the vagina of J.K a child aged 13 years with his penis.
5. The prosecution case is that the victim in this case who offered evidence as PW-1, was born in August 2003. She was living in Kiirua with her mother (PW-2), a sister and a brother. The appellant was their neighbor at the plot where they were living and their houses mirrored each other. At the time of the alleged offence, that is on 29th September, 2022 the victim was a pupil at Kiburine Primary School, in class 8. She had known the appellant as a neighbor for a period of almost 4 years.



6. In the month of August 2022 when she was from the shop she met the appellant at around 9:00am. The appellant caressed her breasts. She was not amused and she reported the incident to her mother (PW-2). The mother said if he repeat it again she will report him to the area chief.
7. In September, 2022 the victim and her mother had gone to the farm. At about 10:00am the mother sent the victim home to collect nails and cups. When the victim got home she saw the appellant. She was scared of him given his past conduct. She decided to let him go as she stood waiting. He got into a corridor in between their houses. After he had left, the victim followed. When she got to the corridor, she saw the appellant at the place picking farm tools which he had stored at the place. The appellant had closed one door at the end of the corridor. When she tried to escape the appellant held her by the neck. He pushed her against the wall. They were only the two of them at the place that time. He covered her mouth and told her that she could not do anything to him. He removed her dress and stockings as he told her that it was not his first time to rape someone. He further expressed that he had raped others before, and that was the beginning for them. He warned her that if she screamed she will be in trouble. He then forced his penis into her vagina. He penetrated her forcefully. She pleaded with him to stop but persisted. He continued as she pleaded that he was damaging her life. After he finished he pinned her to the wall and told her that he will have to repeat it again. He then said he will allow her to leave but if she dared tell anyone he will kill her and take her body to a place where no one will ever trace. She was then let go.
8. She returned to the farm after about an hour, a distance that normally take about 15 minutes. She told the mother she was unwell and she laid outside for the rest of the day. The mother thought she did not want to work. After work they returned home slowly.
9. At about 4:00pm as the victim was going to the shop she met the appellant. He held her and led her to the bush. He told her he will do it again.
10. She begged him not to, saying she will not tell anyone. He then let her leave. When she returned home the mother asked her what happened as she was limping but she did not tell her.
11. On 20/10/2022 the area Chief went to the school where complainant was schooling. She gave a talk to the pupils, sensitizing them on issues of defilement. She told them if they engaged such problems the Government was there to assist them. She urged them to report such issues to her. The victim exploited the opportunity and reported to her about the incident in this case.
12. The matter was reported at Kiirua Police Station. PW-5 investigated the case.
13. The victim was taken to Nairobi Women Hospital, Meru Branch, for treatment and Counselling. She was examined by PW-3 who filled her P3 and PRC forms. She noted that her hymen was broken a while ago. She was of the opinion that the finding was consistent with vaginal penetration.
14. PW-5 was led by the Village Elder, Area Manager and the Chief to where the appellant was working. They found him and he was arrested.
15. The victim was taken to Meru General Hospital for age assessment, and her age was assessed then as between 12 and 13 years old.
16. After completion of investigations the appellant was charged with the offences carried in the Charge Sheet.
17. The appellant gave sworn defence and called no witness. His case is that he is a farmer at Kiiru. One day he was called from work and told there was a fight at home. When he arrived he found it was his wife fighting other women. He advised them to go to the Area Manager who settled the dispute.



18. After one month when he was digging a borehole, the police went for him. He was arrested. He was not told the cause for the arrest. His wife explained to him later. He was asked to pay 20,000/= to secure his release. He had no such money. He was then taken to court and charged.
19. The trial court evaluated the evidence and found him guilty of the offence in the main count. He was convicted of it and sentenced to serve 15 years imprisonment.
20. The appellant dissatisfied with the said conviction and sentence preferred an appeal to this court on the grounds that:-
 1. The charge sheet is defective.
 2. The age of the victim was not proved.
 3. The medical report does not support the allegation of defilement.
 4. The Vendetta between the appellant and the complainant's mother was not considered.
 5. The case was not proved to the required standard in law; broken hymen is not prove of defilement.
 6. Appellant defence was not weighed.
 7. Period spent in custody was not considered.
21. The appeal was canvassed by way of Written Submissions and both parties filed their respective submissions.
22. As a first appellate court, I have re-evaluated the charges, evidence on record, Judgment of the trial Court and Sentence meted; Grounds of the Appeal and submissions filed.
23. On the issue of the alleged defective Charge Sheet, I note that the Charge sheet, indicates the date of the offence as 29th September, 2022. The victim in her testimony indicated the incident occurred in August before the elections. Her mother stated it was in September, 2022. The P.3 form indicates it was on 23rd September, 2022. I do agree there is a discrepancy between the date of offence in the Charge Sheet and the one disclosed by the witnesses in their evidence. However, I am persuaded by the Jurisprudence of our Superior Courts that a discrepancy in the date, in and of itself, is not fatal to a charge unless it causes material prejudice to the accused or goes to the root of the case (See Peter Ochieng -vs- Republic [1985] eKLR and Joseph Muthee -vs- Republic [2010] eKLR).
24. In view of the foregoing I find no merit in this ground.
25. Other grounds generally relate to the usual ingredients for the offence of defilement under Section 8 (1) of the *Sexual offences Act*, No 3 of 2006.
26. These are:-
 - Age of the complainant.
 - The victim must be a child under the age of 18 years.
27. In this case, the victim stated she was born in August, 2003. The offence allegedly took place in September 2022. Simple calculation places her age at 19 years old. The mother did not indicate when she was born and a Birth Certificate was not produced. The prosecution relied on an age assessment report which places her age at between 12-13 years. The report is dated 31/10/2022. Definitely this as



a striking discrepancy. The question is, which evidence should hold in case of such a discrepancy? In *Fappyton Mutuku Ngui -vs- Republic* [2012] eKLR, the court of Appeal held that:-

Age is a critical element of the offence of defilement and must be proved by medical records, Birth Certificate, or age assessment reports. It's not enough for the victim or guardian to merely state the age."

28. The trial Magistrate who had the advantage of seeing the witness testify, in her finding on the issue stated:-
29. Her age assessment report dated 31st October, 2022, (Pexb.4) prepared by Dr. Kamere Elaine, the Dentist in charge, Meru level 5 Hospital, indicated that her approximate age as at that date was between 12-13 years. I am satisfied that she was aged 13 years at the time of the alleged offence."
30. In my own view, the facts that her mother PW-2 did not tell her age, and that there were no documents like Clinic Card, Baptism Card, Birth Certificate or a School document showing the victim's age, she was not certain of her age when she said she was born in August, 2003. The court was therefore right in relying on the most dependable evidence of what was available, and that is an age assessment report by an expert who placed her age between 12-13 years. Her age was thus established beyond reasonable doubt.
31. The other ingredient is of penetration, whether partial or complete, of a genital organ by a genital organ.
32. The evidence of the victim shows that the appellant herein penetrated her vagina using his penis. The Clinical Officer's Report corroborated her evidence as the hymen was noted absent. The details in her evidence on how the offence was carried out shows her truthfulness, giving credence to her claim on penetration. It reveals beyond reasonable doubt that she was penetrated.
33. The last is on identification of the culprit.
34. It is not disputed that the appellant was a close neighbor of the victim for a period of more than 4 years. She knew him very well and couldn't have made a mistake of him. The evidence is actually of recognition as opposed to identification, of which is more reliable.
35. Recognition of the perpetrator is not disputed and is not in doubt.
36. Having weighed the foregoing, I have found as the lower court did, that the offence against the appellant was proved by the prosecution beyond reasonable doubt, and he was rightly convicted of it.
37. On sentence Section 8(3) of the Sexual offences Act No. 3 of 2006 is clear that where the victim is between the age of 12 and 15 years old, the perpetrator upon conviction shall be liable to imprisonment for a term of not less than twenty years.
38. In this case, given the age of the victim which was 13 years, the minimum sentence which should have rightly been meted against the appellant is 20 years imprisonment, less the period spent in custody. The sentence of 15 years imprisonment is therefore an illegal sentence of which this court has an obligation to correct.
39. The record shows he was arrested on 27/10/2022. He secured bond on 16/12/2022. He was out on bond till 29/6/2023 when his bond was cancelled. From then to 7/2/2024 when he was sentenced he was in custody. From 27/10/2022 to 16/12/2022 there are 50 days. And from 29/12/2022 to 7/2/2024 there are 223 days of which makes a total of 273 days spent in custody.



40. The bottom line is that the Appeal on conviction fails, and the Sentence of 15 years imprisonment is set aside and replaced with one of 20 years imprisonment, less the period spent in custody of 273 days.
41. Prison Authorities to effect the said order.

DATED AND DELIVERED AT MERU THIS 31ST JULY, 2025

S.M. GITHINJI

JUDGE

APPEARANCES:-

Ms. Adhi for the State

Appellant Present in Meru Prison

