



REPUBLIC OF KENYA



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**Munjaru v Republic (Criminal Appeal E023 of 2024)
[2025] KEHC 12018 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 12018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E023 OF 2024**

MS SHARIFF, J

JULY 30, 2025

BETWEEN

EMMANUEL MUNJARU ALIAS BABA JOSE 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* No. 3 of 2006. The particulars being that on the 3rd day of March 2020, at (particulars withheld) area, Kimilili Sub-County within Bungoma County, he intentionally caused his penis to penetrate the vagina of ENJ a child of 7 years.
2. In the alternative charge, the Appellant was charged with the offence of committing an indecent act contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on the 3rd day of March 2020, at (particulars withheld) area, Kimilili Sub-County within Bungoma County, he intentionally and unlawfully touched the vagina of ENJ a child aged 7 years with his penis.
3. The Respondent called Five (5) witnesses in support of its case and in his defense, the Appellant gave a sworn testimony and called one witness.
4. Upon considering the evidence adduced by both parties, the Trial Court found that the Respondent had proved its case against the Appellant beyond reasonable doubt. The Appellant was thus convicted and sentenced to serve life imprisonment.
5. Aggrieved by the conviction and sentence, the Appellant filed his Petition of Appeal in which he raised the following amended grounds of appeal:
 - a. That the trial Court erred in law and fact by awarding a harsh and excessive sentence.



- b. That the trial magistrate erred in law and fact by failing to consider the alibi defence adduced by the Appellant.
 - c. That the trial magistrate erred in law and facts in convicting the Appellant yet the charge of defilement was not proved.
6. He prayed that this Court allows his appeal in its entirety.
 7. The appeal was canvassed by way of written submissions. Both parties complied.
 8. As a first appellate Court; I shall re-evaluate and reassess the evidence afresh and arrive at my own independent conclusions. I am however reminded that unlike the trial Court, I neither saw nor heard the witnesses and give due regard for that. See *Okeno v R.* (1972) E.A. 32.
 9. After a brief *voire dire* examination, the Court established that the Complainant could tender sworn evidence. She testified that she attends school and that she was in grade 3. According to her, on 3rd March 2020, while at her grandmother's home, the Appellant herein called her to go carry the child 'Jose'. When she complied, the Appellant proceeded to close the door behind her, unzip his trouser and remove her inner pant and he placed her between his legs, took his "dudu" and placed it inside her "dudu". She told the Court that the Appellant threatened to kill her if she dared to scream or tell her mother and her father. She testified that she felt pain and could not walk. After the ordeal, she went back home and when her mother noticed that she was not walking properly, she told her that the Appellant placed her between his legs and did bad manners to her. Her mother recounted everything to her father and she was rushed to the hospital for medical assistance and they later reported the incident at Kimilili Police Station. She told the Court that the Appellant is a neighbor and that her home about 50 to 70 metres apart from her home. She did a dock identification of the Appellant. On cross-examination, she told the Court that the Appellant placed her between his legs, unzipped his trouser, removed her pant, removed his "dudu" and placed it inside her "dudu" and that all this happened while the Appellant was kneeling on his legs. She told the Court that 'Jose' had been playing outside.
 10. PW2 was EKK, the mother of the Complainant, testified that on 3rd March 2020, she noticed the Complainant could not walk and was vomiting. On inquiry, the Complainant told her what the Appellant did to her when he called her to his house to carry "Jose". On inspecting the Complainant's private parts she noticed dirt and saw sperms and some blood and this prompted her to inform the Complainant's father as soon as he got home. They then proceeded to seek medical assistance and reported the incident to the police. She told the Court that the Appellant was her neighbor. It was her testimony that the Complainant was born in July 2013 and at the time of the ordeal she was 7 years old. On cross-examination, she told the Court that when she inspected the Complainant she did not have any inner pant and that it was the Appellant who defiled her daughter.
 11. PW3 was SJK, the father of the Complainant told the court that on 3rd March 2020, he was informed by his wife, PW2, that the Complainant had been defiled by the Appellant herein. He informed the village elder (Nyumba Kumi) and proceeded to seek medical assistance and later reported the incident to the police. On cross-examination, he told the Court that the Complainant mention the Appellant as the person who had defiled her.
 12. PW4 was Dr. Shivayi David-Ikura, a medical superintendent based at Kimilili Sub-County Hospital produced the P3 form of the survivor which was filled on 4th March 2020 by Dr. Kipsang Masai who went on transfer. He told the Court that the Complainant had visited the facility while in the company of her father and police officers, with a history of defilement by a person known to her. On vaginal



examination, Dr Kipsang Masai observed that the hymen was missing, noted laceration around her vaginal which was tender. Laboratory examination revealed presence of pus cells and red blood cells. He produced the survivor's treatment notes dated 4th March 2020 as PEXH 1 and the P3 form filled on 4th March 2020, as PEXH 2.

13. He also testified that an age assessment had been conducted on PW1 and the same established that she was age 9 years old as of 13th October 2023, but at the time of the incident she had been 7 years old. The age assessment form filled on 13th October 2023, was produced in Court as PEXH 3.
14. On cross-examination, PW4 told the Court that PW1 had visited the facility on 4th March 2020, a day after the incident and that as per their investigation it was confirmed and concluded that she had been defiled.
15. PW5 was No. 10xxx PC Catherine Nyongesa, based at Kimilili Police Station testified that she was the investigating officer in the matter. According to her, a defilement report had been lodged by PW1 against the Appellant who had already been apprehended. On interrogation, the survivor told her that on 3rd March 2020, after school the Appellant had called her to his house to play with his young child Wafu and on entering the house the Appellant proceeded to remove her clothes and defiled her. Further that the Appellant had also threatened to kill the victim. This witness reproduced the testimonies of the victim and her parents as narrated to her by the said witnesses. She stated that the victim was 7 years old at the material time and that the Appellant was their neighbor. On cross-examination, she told the Court that the Appellant was apprehended by nyumba kumi (10 houses villagers) and was thereafter taken to Nasusi police post, and that she never visited the scene. She testified that the doctors confirmed that the survivor had been defiled and that the report was lodged on 3rd March 2020 at 10.00 p.m. and that she had picked up the Appellant from Nasusi Police Post and transferred him to Kimilili Police Station.
16. In his defense, the Appellant denied committing the offence, he testified that on 3rd March 2020 he left his homestead for Naboane area at 3.00 p.m. and later went to Kikwechi Busaa Club to have fun with his friends. He insisted that he only returned home at 9.00 p.m. to meet a crowd of people and nyumba kumi who alerted him that they were looking for him and they then escorted him to Nasusi Administration. Police Camp. He maintained that the charges against him were fabricated and that the issue between him and the victim's family stemmed from a land dispute and did not involve the victim.
17. DW2, Patricia Emmanuel, the wife of the Appellant testified that the Appellant had exited their home that at 2.00 p.m. on the material day and that she was ignorant of his destination, save that he returned home at 9.00 P.M. whereat he was arrested for defilement. She told the Court that it was the nyumba kumi members who informed her of the defilement incident. On cross-examination, she admitted that she was acquainted to the victim who was her neighbor and that the PW3 had purchased land from the Appellant's family. She told the Court that she could not testify about the defilement as she did not know anything about the incident.
18. I have considered the Appellant's amended grounds of appeal, the evidence adduced before the trial Court as well as the submissions and the applicable law. In the circumstances the issues for determination emanating therefrom are as follows:
 - i. Whether the Prosecution's case against the Appellant was proven beyond reasonable doubt.
 - ii. Whether the sentence meted out on the Appellant was excessive and harsh.



Whether the Prosecution's case against the Appellant was proven beyond reasonable doubt

19. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*. The section provides that:
- “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- 8(2) “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.”
20. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are as enunciated in the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013 as follows:-
- Age of the complainant.
 - Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*.
 - Positive identification of the assailant.

Age of the victim

21. PW2 the mother of PW1 told the trial court that her daughter was 7 years as at the material time. PW4 testified that the victim was 7 years old at the time of the ordeal and 9 years old as at the time of production of the age assessment form; PEXH3. The decision of the Court of Appeal in Evans Wamalwa Simiyu vs R Criminal Appeal No. 118 of 2013 [2016] eKLR is instructive on this issue. In that case the Court held:
- “As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act “age” where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years.”
22. As emphasized in the above authorities, there is no requirement that age can only be proved by way of a Certificate of Birth, other evidence such as medical proof, the testimony of the victim's parents or guardian and observation can establish the age of a victim. The age assessment report dated 13th October 2023; PEXH3 placed the estimated age of the victim at 7 years at the time of commission of the offence. The inevitable conclusion from a wholesome analysis of the evidence is that the minor's age at the material time was 7 years.



Penetration

23. Section 2(1) of the *Sexual Offences Act* defines penetration as follows:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

24. 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.”

25. In the instant case, the victim gave sworn testimony that the Appellant was the one who defiled her on 3rd March 2020. while at her grandmother’s home; as per the narration already set forth at paragraph 9 herein above.

26. The evidence of PW1 was corroborated by her parents (PW2 and PW3). The same found further corroboration vide the medical evidence produced by PW4 Dr Shivayi David Ikura on behalf of Dr Kipsang Masai who had examined PW1 and had noted that the hymen was missing, there were lacerations around her vaginal wall which was tender. Laboratory examination indicated presence of pus cells and red blood cells. As already analyzed herein above, this witness produced the victim’s treatment notes dated 4th March 2020 as PEXH 1 and the P3 form filled on 4th March 2020, as PEXH 2. The examining Doctor had formed the opinion that PW1 had been defiled.

27. In the case of *Mark Oiruri Mose v R* [2013] eKLR, the Court of Appeal stated that:

“Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.”

28. Premised upon the foregoing analysis of the record, I do find that penetration had been proved.

Identity of the perpetrator.

29. As to whether the Appellant was the perpetrator, the Appellant’s testimony was that he did not know the victim. PW1 testified that the Appellant herein was a neighbor and the evidence of DW2 confirmed that the victim was their neighbour. It is thus clear that PW1 knew the Appellant well and recognized him as the perpetrator and the Appellant’s testimony that the victim was a stranger to him was a blatant falsehood. In the circumstances, I find that the Appellant was properly recognized as the perpetrator of the offence.

30. In light of the findings, the Appellant’s alibi defence was but an afterthought and a sham. This is an alibi defence was not disclosed during the pretrial stage wherefore the Respondent was never accorded any



time to investigate it. In any event the respondent's alibi did not rule him out as being the perpetrator and the evidence of his wife had no probative value to his defence as she had no knowledge of his whereabouts at the material time.

31. The Court of Appeal in *Erick Otieno Meda v Republic* [2019] eKLR had this to say on alibi defence:-

“In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.”

32. The Court of Appeal then went on to say:-

“In considering an alibi, we observe that:

- a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
- b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
- c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
- d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.”

33. On the balance I find and hold that the Respondent had proved the offence of defilement against the Appellant herein beyond reasonable doubt and therefore the appeal against conviction fails and is hereby dismissed. The conviction of the Appellant for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* was sound and the same is hereby upheld.

Whether the sentence meted out on the Appellant was excessive and harsh.

34. Under *Sexual Offences Act*, sentence for defilement is prescribed based on the age of the victim of the sexual assault; the younger the victim, the severe the sentence.

35. In this case, the Complainant was of the age of 7 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the Act which provides:

“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.”

36. Sentencing is exercise of discretion by the trial Court which should never be interfered with unless the trial Court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo - Vs - R.*, and *Wilson Waitegei V Republic* [2021] eKLR).



37. Also, I note that on 18th December 2023, during sentencing, trial Court gave the Appellant an opportunity to mitigate but he opted to remain mute of malice.
38. The Supreme Court of Kenya pronounced itself on the legality of Section 8 of the *sexual Offences Act* in the case of Republic Vs Joshua Gichuki Mwangi & Others, Petition NO 18 of 2023 (2024) KESC34 KLR (12th July 2024) and emphasized the necessity of upholding the doctrine of separation of powers in the three arms of Government. This court is bound by the said decision of the Supreme Court by dint of the doctrine of stare decisis as enshrined under article 163(7) of *the Constitution* of Kenya 2010. The life sentenced meted upon the appellant was lawful and statutory compliant wherefore I have no basis for setting it aside.
39. In conclusion I find that this appeal is devoid of any merit and I therefore dismiss it in its entirety. It is hereby so ordered.
- Orders accordingly.

DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 30TH DAY OF JULY 2025.

M.S.SHARIFF

JUDGE

In the presence of

Appellant

Ms Kibet For Respondent

Peter Machoni - Court Assistant

