



**Mwaura v Republic (Criminal Appeal E003 of 2024)  
[2025] KEHC 12271 (KLR) (27 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12271 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL APPEAL E003 OF 2024  
RC RUTTO, J  
AUGUST 27, 2025**

**BETWEEN**

**JAMES MAINA MWAURA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence judgment delivered  
on 16/9/2021 by Hon. A.M Maina (CM) of Thika Law Court)*

**JUDGMENT**

**A. Introduction**

1. The appellant aggrieved by the decision of the trial court that convicted him for the offence of defilement contrary to section 8(3) of the [Sexual Offences Act](#) Cap 63A lodged this appeal. He seeks that his conviction be quashed and the twenty years imprisonment sentence set aside.
2. The appeal is premised on the following grounds, that: -
  - a. The learned judge erred in both law and fact considering the evidence adduced of the doctor which was not enough base for conviction.
  - b. The learned judge erred in law and fact that the first report of the complainant was doubtful according to the other witnesses testimonies.
  - c. The learned judge erred in law and in facts in convicting me basing on witnesses' evidence which was fully contradictory.
  - d. The learned judge erred in law and fact to give due consideration on the plausible defense.
  - e. The learned judge erred in law and facts to rely on prosecution evidence that was riddled with contradictions and discrepancies leading to selective judgment.



## B. Background

3. Before the trial court, the appellant was charged with the offence of defilement contrary to section 8 (1) (3) of the *Sexual Offences Act*. The particulars of the offence were that on 30/9/2019 at [Particulars Withheld] in Juja sub county within Kiambu county, intentionally and unlawfully penetrated the vagina of S.N.N a girl aged 13 years old. The appellant also had an alternative charge contrary to Section 11 (1) of the Sexual of Offences Act (herein The Act).
4. The appellant pleaded not guilty to all the charges and to prove its case, the prosecution called 6 witnesses.

## C. Prosecution case

5. The trial court conducted voir dire on the complainant and held that the minor would give a sworn statement. PW1, S.N.N. stated that she was 13 years old in standard 7 at [Particulars Withheld] School. That on 30/09/2019, the appellant who had been her boyfriend for around one week asked her to go with him to his house and she agreed. That they went to his friend's house where they spent the night and had sexual intercourse. She stated that around 3:00am on the same night, she and the appellant went to a home where funeral prayers and meetings were being held and they slept there till morning. That they also had sexual intercourse whilst there.
6. PW1 added that they went back to the accused home in the morning, picked his motorcycle and went back to the said home. That her father, his friends and the appellant's brother were to later find them and they were both taken to Gachororo Health Centre where she was treated. She also stated that she and the appellant had no prior differences.
7. PW2 and PW3 were the neighbor and aunt of the S.N.N respectively. They both testified that S.N.N had gone missing from home but they later found her together with the appellant. PW3 also testified that she had warned S.N.N against the friendship with the accused.
8. PW4 was S.N.N's father, also stated that S.N.N disappeared from home on 30/9/2019, he reported the missing person report at Darasha Police Post. That he later traced her with the help of his friends and the appellant's brother who led them to where the appellant was. That they found S.N.N. together with the appellant in a home that was having many mourners. He explained that he then reported the matter at Juja Police Station and took S.N.N to hospital at Gachororo Health Centre where she was treated and P3 and PRC form filled.
9. As regards her age, PW4 testified that the minor was born on 22/11/2005. That he knew the appellant before the incident as he had passed near his home with a motorcycle.
10. PW5 was a clinical officer at Gachororo Health Centre. He testified that he examined S.N.N on 2/11/2019. She had alleged that she had been defiled. The examination revealed that the hymen was broken and she had a whitish smelly discharge from her vagina. He thus concluded that the minor had been defiled and he offered treatment for the infection and counseling. He produced the treatment notes, the P3 form and PRC as exhibits after confirming that he had filled them.
11. PW6 No 93330 PC Esther Maina stated that on 1<sup>st</sup> October 2019 while on duty she learnt of a defilement case of a victim who had gone missing on 30<sup>th</sup> September 2025. That the investigations revealed that she had been defiled and she issued the P3 and PRC form. That the appellant was identified by the complainant, and were found together. She also produced the birth certificate as an exhibit.



#### **D. Defence case**

12. DW1, the appellant, in his defence, gave unsworn evidence and denied that he ever committed the offence and that he was being framed. He did not call any further witnesses and closed his case at that point.
13. In its judgment, the trial court identified two issues for determination; whether the complainant was defiled as alleged, and whether the appellant was positively identified as the man who defiled her.
14. On the issue of penetration, the trial court found that S.N.N. gave consistent evidence. There was no evidence of a grudge between the appellant and minor. It was also found that PW1's evidence was corroborated by PW2, PW3 and PW4 all of whom confirmed that on 1/10/2019, PW1 and the appellant were found together in a house after PW1 had gone missing the previous day. It was also found that PW5 confirmed that PW1 had been defiled and presented medical evidence, the P3 form, PRC form as well as treatment notes which supported that finding. That the medical finding revealed that the hymen was missing and PW1 had a sexually transmitted infection which was proof of defilement. Based on all this, the trial court found that PW1 had been defiled.
15. On the issue of identification, the trial court reaffirmed its position that PW1 remained consistent in her evidence even during cross examination and she had no reason to testify falsely against the appellant. That PW1, PW2 and PW3 all confirmed that the appellant was found together with PW1 on 1/10/2019, a day after she went missing. The trial court also found that the appellant's defense had not in any way cast doubt to the prosecution case.
16. The trial court thus found that the prosecution had proven its case against the appellant beyond reasonable doubt and he was convicted of the offence of defilement contrary to Section 8 (1) & 8 (3) of The Act. Under Section 215 of the CPC. During sentencing, the trial court considered the mitigation, the age of the victim and period the accused person had been in custody. The appellant was then sentenced to twenty years imprisonment.

#### **D. The Appeal**

17. The appeal is as set out in the earlier paragraphs of this judgment. The appellant seeks that his conviction be quashed and the sentence set aside.
18. The appellant relied on his written submissions dated 21/8/2024. The respondent's submissions were however not on record at the time of writing this judgment.

#### **Appellant's Submissions**

19. The Appellant amended his appeal vide his submissions by reducing the grounds of appeal to four main grounds to wit: -
  - a. The trial magistrate erred in law and facts by failing to find that penetration of the genitalia by the appellant and identification of the appellant as the perpetrator of the offence was not proved.
  - b. The trial magistrate erred in law and facts by failing to find that the trial court failed to realize that the complainant's behavior was of a person above 18 years.
  - c. The trial magistrate erred in matters of law and facts by failing to realize that I deserve the statutory defence as stipulated under Section 8(5) (6) of the [Sexual Offences Act](#) No. 3 of 2006.



- d. The trial magistrate erred in matters of law and fact by failing to find that the court's hands are no longer tied and can met out a sentence that is not a mandatory sentence.
20. On the first ground, it was submitted that if at all there was penetration, it was not by the appellant. That the medical documents produced by PW5 were not dated, and did not state whether the hymen was recently broken or formerly. That a broken hymen was not proof of penetration. He relied on *Langat Dinyo Domokonyang V Republic* (2017) eKLR. It was further submitted that PW1 engaged in sexual intercourse without being forced and ran away to stay with the appellant on her own free will and was even planning on running away with the appellant to Nairobi. That the appellant was not aware that PW1 was a child as she presented herself as a grown-up who was ready for marriage. That the appellant had never seen PW1 going to school. That PW1 thus had capacity to consent and encouraged sex from the beginning. That it was unfair to imprison the appellant for 20 years in the circumstances. He relied on *Criminal Appeal 273 of 2010 Duncan Mwai Gichuhi vs Republic* (2015) to support the position that there was no forceful penetration.
21. The appellant further argued that he was deceived and the statutory defence of deception was well presented and the appellant was entitled to such defence. That he had never seen PW1 going to school and never expected a child to attend a disco matanga. That PW1 lied about her age to appear as an adult and freely engaged in sex by behaving like an adult and freely offered herself. That the trial magistrate never commented on the issue of age which was vital in the case, and neither did PW2 and PW3 address the issue of age. That the birth certificate was not produced thus the issue of age remained uncertain. That documents marked for identification could not be relied upon as held in *Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others* (2015) eKLR, *Karisa Katana Gona v Republic* (2015) eKLR and *Martin Charo vs Republic* (2016). That though it was upon the accused to prove the steps taken to establish age, the burden of proof was not beyond reasonable doubt.
22. As regards the sentence, the appellant submitted that the mandatory sentence ought not to have been meted out in light of jurisprudence that allowed a court to exercise discretion. That the appellant was arrested when he was between 20-25 years and had already spent 5 years in prison and was ready to be re-integrated with the society. That he had changed behavior and matured and was thus rehabilitated. He also submitted that in line with Section 333 (2) of the Criminal Procedure Code, his sentence ought to have been computed from the date of his arrest as held in *Petition No. 15 of 2020 Vincent Jona Sila & 87 Others and Ahamad Abolfathi Mohammed & Another vs Republic* (2018) eKLR.
23. The appellant thus prayed that the conviction be quashed and the appellant be set at liberty, and in the alternative, the term spent in prison from 5/1/2021 be found to be sufficient sentence. This Court was also implored to pronounce a non-custodial sentence and consider that the appellant was remorseful and was deceived into the act.

### **E. Analysis and determination**

24. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of *Pandya v R* {1957} EA 336; *Ruwalla v R* {1957} EA 570 and *Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic* [2010] eKLR where the Court of Appeal held that: -

“the duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same



conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

25. Having considered the record of appeal as well as the submissions by parties, I discern the following issues for determination: -
- a. Whether the offence of defilement was proved;
  - b. Whether the sentence was harsh and excessive

#### **Whether the offence of defilement was proved**

26. Section 8(1) of the *Sexual Offences Act* (herein The Act) provides that: -

“a person who commits an act which causes penetration with a child is guilty of an offence termed defilement”. While 8(2) states: 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.”

27. In the case of *George Opondo Olunga v Republic* (2016) eKLR the ingredients for the offence of defilement were set out as: -

- a. Proof of the age of the victim;
- b. Proof of penetration or indecent act;
- c. Identification of the perpetrator.

28. On the issue of age, the charge sheet indicated that the minor was 13 years. The birth certificate on record identified by both PW1 and PW4, the complainant and her father respectively, indicated that was born on 15/8/2009 thus the minor was indeed 13 at the time of the alleged incident as prescribed in Section 8(2) of the Act. The accused person submitted that the birth certificate was not produced as evidence, however, the record indicated otherwise, as the birth certificate was produced as an exhibit by PW6, P.C Esther Maina during her examination in chief. Notably, there was no objection to its production. In *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR the Court of Appeal stated as follows in respect of proving the age of a victim in cases of defilement: -

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

29. I find that this ingredient was sufficiently proven.

30. On penetration, Section 2 of the *Sexual Offences Act* define penetration as follows: -

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



31. The Court of Appeal in *Chila v. Republic* (1967) E.A 722 articulated this position and held that: -

“The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice.”

32. PW1 testified and confirmed that on 30/9/2019 and 1/10/2019, she had sexual intercourse with the accused person whom she termed her boyfriend. Her testimony remained consistent throughout and there is no evidence suggesting any malicious intent or motive for revenge against the accused. Further her evidence is supported by three eye witnesses who confirmed seeing the appellant with the complainant on 1/10/2019, the same day PW1 testified that she had sexual intercourse with the accused thereby corroborating her testimony. The medical evidence further strengthen the prosecution’s case. PW5 testified that upon examining PW1 he concluded that she had been defiled. The P3 form, PRC form and treatment notes indicated that her hymen was missing and she had a whitish smelly discharge from her vagina and was treated for the infection and counselled.

33. In the case of *Bassita Hussein v Uganda*, Supreme Court Criminal Appeal No 35 of 1995, the court stated thus: -

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence.”

34. Consequently, guided by the above, I find that the evidence of the victim, PW2, PW3 and PW4 was sufficient to proof the ingredient of penetration, and there is no reason to disturb the finding of the trial court.

35. On identification, not only did PW1 positively identify the appellant as his boyfriend, PW2, PW3 and PW4 all found the complainant with the accused on 1/10/2019. The accused never denied that he was with the complainant and never denied knowing her. PW4 had also identified the accused having seen him around PW4’s home riding a motorcycle. As it were, the prosecution proved its case against the accused noting that the accused did not raise any defence before the trial court.

36. Notably, in his submissions before this Court, the appellant raised the statutory defence under Section 8(5) of The Act. This is a new twist and an interesting change of story by the appellant. At the trial court, the appellant testified that he never committed the offence and was framed. In his submissions before this Court, he admitted that he committed the act but maintained that he was deceived by the complainant into believing she was an adult. I do note that the appellant never raised such defence and never gave the prosecution a chance to challenge such defence. In *Calvince Otieno Juma v Republic* [2020] eKLR, the court held that: -

“It is surprising that the appellant denied any knowledge of the complainant during the trial, but changed his position on appeal. The defence came up too far late in the day. It also has no basis in the trial. The prosecution was denied the opportunity to challenge the defence. The defence cannot therefore aid the appellant.”

37. I do find that the defence was an afterthought and invoked too late in the day. Even then, it is doubtful whether such defence would have been successfully invoked.



38. The Act provides as follows in section 8(5) and (6):

- “(5) It is a defence to a charge under this section if-
- a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
  - b. the accused reasonably believed that the child was over the age of eighteen years.
6. The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.”

39. Subsection (5) thus states that it is a defense to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years.

40. In *Wambui v Republic* (Criminal Appeal 102 of 2016) [2019] KECA 906 (KLR) (22 March 2019) (Judgment), the Court of Appeal held that: -

“We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years.”

41. It has already been established that the complainant was 13 years old at the time of the incident. This was quite a tender age to make one believe that she would act and reason like an adult. At such a tender age, it cannot be said that the minor had capacity to consent to the sexual intercourse. Further, as correctly submitted by the appellant, it was upon him to demonstrate the steps he had taken to ascertain that the complainant was of age.

42. The appellant did not submit either before the trial court or this court that he had made efforts to verify the complainant’s age. Although he submitted that he did not expect a child to attend a ‘disco matanga’, it is important to note that he was the one who took her there. He did not find her at the event. Furthermore, he led her to a house located away from the homestead where the funeral gathering was taking place and while there engaged in sexual intercourse with her.

43. PW1 also testified that it was the appellant who persuaded her to run away from home and that he had previously visited her home. Therefore, it cannot be said that the complainant lured or deceived the appellant, rather the evidence shows that he actively pursued her and influenced her decision to leave home. PW2 also confirmed that the appellant had been warned to stop visiting the complainant’s home and he had promised to stop. Additionally, PW4, the complainant’s father, also testified that the appellant had been seen near his home riding a motorbike. It therefore cannot be said this is a case of a minor enticing an adult into sexual activity, but one where an adult deliberately sought out and engaged in sexual intercourse with a girl of tender age. In *Bernard Mbindyo Kitheka v Republic* [2020] eKLR, the Court held thus: -

“From the above, it is quite clear that even if the complainant had presented herself to the appellant to have been over 18 years of age, the onus was on the appellant to ascertain the said age was correct. This was mandatory as the provision above was introduced so as to



protect victims from sexual molestation and it raised the bar on the perpetrator to ensure that they were indeed dealing with adults and not minors. The appellant in his defence did not give evidence on any steps that he took to establish the age of the complainant nor did he give evidence to invoke the statutory defence under section 8(5) of the Act.”

44. Guided by the above, I find that the appellant did not discharge his burden of proof and the statutory defence was not available to him.
45. Flowing from the foregoing I find that the prosecution proved all the ingredients of defilement. I find no reason to disturb the finding of the trial court.

#### **Whether the sentence was harsh and excessive**

46. Section 8 (3) of The Act provides that: -

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

47. The offence of defiling a child aged twelve and fifteen years with which the Appellant was charged with, prescribes a minimum sentence of not less than twenty years. There has been judicial discourse on constitutionality of the minimum sentences under Section 8 of the Act.
48. However, in its most recent precedent, the Supreme Court settled the issue in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment)* where it upheld the constitutionality of the mandatory minimum sentence under the *Sexual Offences Act*. This Court is bound by such precedent.
49. It then follows that until a matter is duly filed challenging the constitutionality of the minimum sentence under Section 8 (3) of The Act, courts must follow the statute as provided for. I thus find that the trial court correctly applied the minimum sentence under Section 8 (3) of the *Sexual Offences Act*. Additionally, I do note that in sentencing, the trial court explicitly considered the period the accused person had been in custody.
50. I find that a sentence of 20 years imprisonment was lawfully imposed and the same is upheld.
51. The upshot is that the appeal is found to be without merit and is dismissed the trial court’s decision is upheld.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 27<sup>TH</sup> DAY OF AUGUST, 2025.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

Appellant present from Kamiti Medium prison

Ms Torosi for Respondent

Peter Court Assistant

