Kipkosgei v Republic (Criminal Appeal E023 of 2024)
[2025] KEHC 11819 (KLR) (6 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11819 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E023 OF 2024

HI ONG'UDI, J

AUGUST 6, 2025

BETWEEN

BETHWEL KIPLAGAT KIPKOSGEI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment delivered by Hon. Barasa (Chief Magistrate) in Naivasha Chief Magistrate's Criminal (S.O.) No. 056 of 2023 on 6th August, 2024)

JUDGMENT

1. Bethwel Kiplagat Kipkosgei hereinafter referred to as the appellant was charged with two counts of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

2. The offence in the 1st count was committed on 14th October, 2023 and the victim was R.A.C a boy child aged 8 years old.

   In the 2nd count the victim was P.A.K a boy child aged 7 years and the incident occurred on 22nd October, 2023.

   The appellant faced alternative charges on each count being indecent act with a child contrary to Section 11(1) of the *Sexual offences Act*.

3. He denied all the charges and the case proceeded to full hearing with the prosecution calling ten (10) witnesses.

   The accused gave a sworn statement of defence without calling any witness.

4. Later, Judgement was delivered on 6th August, 2024 and the appellant was convicted and sentenced to life imprisonment on each count with an order that the sentences run concurrently.

5. Being dissatisfied with the Judgment the appellant filed this appeal on the following amended grounds:

i. That, the learned trial Magistrate erred in law and fact by failing to find that the ingredients of the offence were not proved.

ii. That, the trial was unfair contrary to Articles 25(c), 27(1) (2) (4), 28, 29(f), of *the Constitution*.

iii. That, the learned trial Magistrate erred in law by awarding a mandatory minimum life sentence that offended Articles 25(c), 27(1) (2) (4), 28, 29(f), 50 (2) (p) of *the Constitution*.

6. The victims PW1 and PW2 who are cousins gave their evidence on oath after each being taken through a voire dire examination. It was their evidence that on different dates they were defiled by the appellant. PW1 testified that on 14th October, 2023 morning he was at his grandmother's home when the appellant asked him to help him get things that were in a hole near his grandmother's home. He had been seeing the appellant around there. Bilal had gone to graze cattle. He went with the appellant upto the hole. While there the appellant told him to remove his clothes, which he did and he inserted his penis in the boy's anus as he lay down. He felt pain in his anus and the appellant who left to go and graze sheep told him not to tell anyone and he complied. On one Sunday Peter Prince his cousin (PW2) had a similar experience with the appellant.

7. They were grazing cattle when the appellant called PW2, and asked him (PW1) to go home which he did. Later PW2 shared with him what the appellant had done to him. They reported to Jafer their cousin who went to look for the appellant. They were taken to hospital. Later he was able to identify the appellant among several people at the police station.

8. In cross examination he said Bilal is his elder brother who knew the appellant very well. PW2 confirmed he informed his parents, what had happened.

9. PW2 gave similar evidence to that of PW1 in respect of what transpired on 22nd October, 2023.

10. PW3 JZK testified that on 22nd October, 2023 he had gone with PW2 to visit their grandmother. PW1 and PW2 had been sent to graze by their grandmother at about 10 a.m. The grandmother gave him food to take to the boys. He did not find them so he began looking for them. On the way he met the appellant, who he asked if he had seen the children, but he told him he had not and the search continued.

11. Thereafter, he met PW1 who informed him that PW2 had been defiled and that he too had been defiled earlier. He went with their grandmother and reported the matter at the police station. He took the boys to hospital in Naivasha.

12. In cross examination he said from the granny's home to where the kids were grazing is over 500M away. He denied seeing other people on the farm, where the cattle were grazing.

13. PW4 SW is the grandmother of PW1 – PW3. On 22nd October, 2023 she had sent PW3 to take food to PW1 & PW2 at around 11.00 a.m. but he took long. She decided to go and search for them and that's when he met PW1 & PW2 who told her they had been defiled. She told PW3 to take the children to hospital while she went to the police to report.

14. PW5 ZNC is the mother to PW2 whom she said was born on 16th February, 2016. She identified his birth certificate. She received a report from PW2's grandmother (PW4) on had what happened. She informed her husband and they travelled to Naivasha where they met PW2 together with PW1 and PW2 at the District hospital. The boys were examined and confirmed to have been defiled. They were later notified of the arrest of the suspect, and they went to Naivasha police station from where PW1 identified the suspect.

15. In cross examination she said PW2 was visiting his grandmother and he did not know the area people.

16. PW6 Mr Benjamin Kuria a clinical officer at Naivasha district hospital said he examined PW2 on 24th October, 2023 which was 9 days after the defilement. Upon examination he did not find any wounds at the anus but it was widened than normal and had pains. HIV & Syphilis tests were negative. He produced the P3 form as P Exhibit 2.

    He next examined PW2 two days after the incident. He found the anus with bruises at 6 O'clock and 12 O'clock with no discharge.

    The tests for Syphilis was negative. He produced the P3 form as P Exhibit 3. He further stated that the degree of injury to both PW1 and PW2 was grievous harm.

17. PW7 – Regina Katile Muindi a clinical officer at Naivasha district hospital filled the post rape case forms for PW1 and PW2, after examining them. She found PW1 to have a dilated opening of the anus. It was wider than normal. She found PW2's anus to have bruises at 6 O'clock and 12 O'clock. The examination tests for HIV & Syphilis were negative for both PW1 and PW2. She produced the two forms as P Exhibit 3 & 5 respectively. PW2 had been brought to the hospital on the same date of incident.

18. PW8 – No.262953 APC Calistus Kiplangat attached to the Anti-Stock Theft Unit, Mirera stated that he received a report from PW4 who complained that her grandchildren had been sodomized. The children said it was the appellant who sodomized them. They later arrested the appellant whom they took to hospital as he claimed to have been beaten. The person who sodomized the boys was grazing goats so they took away the goats that were in the field.

19. PW9 No. 266109 APC Fred Nyakori Kennedy of Anti-Stock Theft Unit Mirera was with PW8 and so gave similar evidence to his. In cross examination he denied having taken the goats, nor having any grudge with the appellant. He denied knowledge of any grudge between the appellant and the victims' family.

20. PW10 No. 101009 PC Woman Linet Apiyo of Naivasha police station reported on duty on 23rd October, 2023 when she noted a report of defilement having been made the previous day. She called the parents who came together with the children. She gave them P3 forms and referred them to the hospital. The appellant was already in the police cells. The parents and children returned and she recorded their statements and those of the witnesses. The appellant had been beaten by officers from Mirera.

21. PW 10 produced the children's birth certificates as P Exhibit 1 & 6 respectively. An identification parade was conducted and she produced the Form as Exhibit 7. She was not aware of any grudge between the appellant and the victims' family

22. The appellant in his sworn defence said he lived in Elgeyo Marakwet taking care of a farm. He was given off on 10th October, 2023 by the Company, and he travelled home on 11th October, 2023 and returned to Kedong on 17th October, 2023. He stated that on 22nd October, 2023 he went to assist a friend cook Kangumu and at 7.00 a.m. the friend went to sell the Kangumu. He went round patrolling the farm and at 9.00 a.m. he went to shop at Karagita. At 1.00 p.m. he was called by a friend who told him that the goats which were on the farm had been detained so he went to check, on them.

23. When he reached there he was arrested, beaten and taken to the police station. That those who arrested him wanted him burnt as they wanted him out of the farm. That the people wanted him lynched for preventing them from grazing on the land, and that was the source of the grudge, hence the frame up.

24. In cross examination he said there was a grudge between him and the complainant's family. He said it was PW4 she had a grudge with.

The land belonged to his employer. He admitted that he did not call any witness to confirm he was off duty. He further confirmed that an Identification parade was conducted.

25. The appeal was canvassed by way of written submissions.

Appellant's Submissions

26. These are dated 29th day of March, 2025. It is the appellant's submissions that the ingredients of the offence were not proved. From the onset his argument is that PW1 and PW2 did not report or tell the police that they would identify the perpetrator if they saw him.

Further that no description of the perpetrator was given to the police prior to his arrest.

27. He further submitted that he had been beaten by the time of his arrest. Additionally the identification flouted the rules for proper identification as he was the only member of the parade who had been beaten. Secondly that the officer who conducted the identification parade never came to testify. This to him breached his right to a fair trial under Article 25(c) and Article 50(2) (k) of *the Constitution* of Kenya. He urged the court to expunge the identification parade forms produced as exhibits.

28. The appellant submitted that his dock identification was unreliable since PW2 did not know the person who defiled him. He referred to the case of Peter Mwangi Mungai v Republic Criminal Appeal No. 140 of 2000 eKLR and Owen Kimotho Kiarie v Republic Criminal Appeal No. 93 of 1983 (UR).

29. He contended that the evidence of Dr Kuria (PW6) in chief and in cross examination differed on the condition of PW1's anus. That the PW6 and PW7 on the cause of bruises said it is not only a sexual act which can cause them.

30. On the trial being unfair he submitted that he was not supplied with all materials to enable him prepare well for his case. To him this violated his right to a fair hearing. He finally he submitted that the sentence meted out on him is too harsh. He referred to the Court of Appeal case of Evans Nyamari Ayako v Republic Kisumu CACRA No. 22 of 2018 where it was declared that life imprisonment translates to 30 years. That considering his age of 19 years the sentence meted on him was too harsh.

Respondent's submissions

31. These were filed alongside the respondent's grounds of opposition by Sharon Koina Principal Prosecution Counsel and are dated 13th March, 2025.

On penetration counsel referred to Section 8(1) of the *Sexual Offences Act* No. 3 of 2006. She further referred to the definition of penetration under Section 2 of the said Act. She linked the evidence of PW1, PW2, PW6 & PW7 to this and submitted that penetration had been proved.

Further that the ages were proved and there was no dispute, on that.

32. Counsel submitted that identification was established through the evidence of PW1 and the identification parade that was conducted as per P Exhibit 7. That PW2 was in the company of PW1 when the appellant approached them and went away with PW2.

33. She further submitted that there was no bad blood that would make the victims frame the appellant. That PW1 & PW2's evidence was consistent and corroborated.

Finally, she submitted that the sentences to serve life imprisonment on both counts was appropriate and consistent with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. She urged the court to dismiss the appeal and uphold the conviction and sentence.

Analysis and Determination

34. This being a first appeal, this court has a duty to re-evaluate and re-assess the evidence and arrive at its own independent conclusion. It has also to bear in mind that unlike the trial court this court did not have the advantage of hearing or seeing the witnesses testify and an allowance must be given for that.

35. This was a principle set out in the case of Okeno v Republic [1972] EA 32.

Further the Court of Appeal in Kiilu & another v Republic [2005] 1 KLR 174 held as follows:

2. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

3. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

36. I have carefully considered the record of appeal, amended grounds of appeal, submissions by both parties, the cited authorities and the law and I find the following to be the issues falling for determination.

i. Whether the identification parade documents were properly admitted by the trial court.

ii. Whether all the ingredients of defilement were proved.

iii. Whether the appeal is merited.

Issue No. (i) - Whether the identification parade documents were properly admitted by the trial Court.

37. Both parties have submitted on this. What then is an identification parade?

This is a procedure used in criminal investigations where a witness or victim is asked to identify a suspect from a group of individuals who are similar in appearance. The witness must have clearly indicated that he/she would be able to identify the suspect.

The purpose is to test the witnesses' ability to identify the suspect and to gather evidence that can be used in court. This clearly confirms the significant place of an identification parade in a criminal case.

38. In the present case there is evidence that an identification parade was conducted.

PW1 in his evidence at page 6 lines 17 – 20 of the record of appeal stated this:

> " I went and reported the matter to the police. I saw the accused person at the police station. There were many people at the police station. I pointed out the accused person to the police. He is the one in Court. I had never interacted with the accused person before the incident"

PW4 at page 10 lines 15 -16 stated this;

> " The following day we went to the police station and we were told accused had been taken to Naivasha. The kids came and they identified the accused persons among 7 people."

PW10 who was the investigating officer stated this at page 18 lines 21 -25.

> " Identification parade was done. Rashid is the one who identified."
>
> Identification parade – MFI 7.
>
> Rashid identified the accused person by touching him. I wish to produce the identification parade P Exhibit 7.
>
> Cross examination
>
> 9 people were lined up in the identification parade. I don't have photos of the identification parade. You were not the only young person in the identification parade. I am the investigating officer."

39. The identification parade form produced as P Exhibit 7 shows that the procedure was conducted by No. 239392 I.P. Gabriel Mwangi. This officer was never called as a witness, yet the trial Magistrate allowed the investigating officer (PW10) to produce P Exhibit 7 without raising any issue. The appellant was denied an opportunity to cross – examine the officer who conducted the identification parade.

40. In his Judgment despite all this the trial Magistrate relied on P Exhibit 7 as part of the evidence on identification. My finding is that P Exhibit 7 could only have been produced by the officer who conducted the identification parade. I therefore expunge the P Exhibit 7 from the record.

Issue No. (ii) - Whether all the ingredients of defilement were proved.

41. The first ingredient for proof of defilement is "Age". The victim must be a minor.

    The two birth certificates (P Exhibit 1 & 6) confirm that the victims were aged 8 & 7 years respectively. They were therefore minors.

42. The next ingredient is "penetration". Section 2 of the *Sexual Offences Act* defines penetration as follows:

> " means the partial or complete insertion of the genital organs of a person into the genital organs of another person"

43. It was PW1's evidence that his anus had been penetrated by a penis on 14th October, 2023, and he only spoke about it on 22nd October, 2023 after the incident in count 2. He was however prompted to speak of his experiences when his younger cousin (PW2) spoke about his own experience. He was taken to hospital the same day of 22nd October, 2023. This is confirmed by PW7 Ms Regina Katile a clinical officer at Naivasha District Hospital. She was the first to see him medically. Her findings were that the boy's anus was dilated. It was wider than normal.

    The victim was then aged eight (8) years.

44. PW1 was later on 24th October, 2023 examined by Dr Kuria (PW6) for purposes of filling the P3 form (P Exibit 2). His finding was that the boy's anus was widened more than normal and had pains. This is clearly reflected in P Exhibit 2 which the appellant had no issues with. It is true that PW6 & PW7

stated in cross - examination that bruises on the anus can also be caused by passing of hard stool or lifting a load.

The appellant in his submissions argued that because of those statements it is his argument that penetration was not proved.

45. I do not find that argument to hold any weight. PW1 was very clear that it was a penis that was inserted in his anus. Secondly, from their evidence in chief PW6 and PW7 made it clear that because of the 9 days stay without going for treatment, no injuries were noted in PW1's anus. What was only noted was the widened anus.

Coming to PW2 who was aged 7 years, it's been shown that he did not keep quiet as PW1. He was thus seen at the hospital on 22nd October, 2023 when the assault was still fresh. The results? PW6 & PW7 in their reports (P Exhibit 3 &5) reveal that the boy's anus had bruises at 6 O'clock and 12 O'clock. There is nothing to make this court doubt these reports. My finding is that "penetration" was proved in both counts.

46. The last ingredient is the identification of the perpetrator. PW1 told the court that he used to see the appellant who used to come from below the place they used to live. After the incident the appellant told him not to tell anyone what he had done to him. The time was around 8.00 a.m. when the appellant told him to help him carry things that were in a hole. It was at this hole where the incident occurred. All this happened on 14th October, 2023.

47. Further, on 22nd October, 2023 he said he was with PW2 grazing cattle. The appellant called PW2 and told PW1 to go home which he did. When they (PW1 & PW2) next met the latter told him what the appellant had done to him. They reported to their cousin (PW3) who went to look for the appellant.

48. PW2 who was then aged 7 years, explained that him and PW1 went to graze cattle. As they played while the cattle grazed a person came there and told PW1 that he was being called and he left. It was then that the person took him to a hole and asked him to remove his clothes and covered him with his jacket. He made him lie down and he inserted his penis in the boy's anus. When he finished he told the boy to run away. He went back to the cattle and there he found PW1. He immediately told PW1 what the man had done to him.

PW1 confessed to him that the person had done the same to him before. They reported to Jafer (PW3) and that is how the other witnesses PW4 reported the matter, to the police.

49. It is true that PW1 and PW2 are minors who were aged 8 and 7 years respectively. The trial court took each through a voire dire examination before they testified. The finding by the trial court on each of them was that though being of tender age they understood the importance of speaking the truth.

Their evidence was tested through cross examination. The record speaks for itself.

50. After the defilement of PW2 the boys told PW3 who it is that had done this thing to them. PW2 even showed PW3 where the culprit could be found. A report was immediately made to the police and action taken since the culprit was known.

51. The appellant in his defence made mention of a grudge between him and the children's grandmother (PW4) hence the alleged fabrication of the offences. PW4 gave her evidence before the trial court and the appellant had all the time to raise the issue of the grudge. Perusal of the record (page 10 & 11) does not reveal any such issue being raised by the appellant in the cross examination of PW3, PW4 & PW5.

This is a clear afterthought. PW2 was just a minor visiting the grandmother (PW4) and had no reason to lie against the appellant.

52. The appellant in his defence raised an alibi for the first time. He did not avail any witness to confirm to the court where he says he was on the date and time of offence. The learned trial Magistrate very well addressed this in his Judgment and referred to the case of Republic v Sukhs Singh s/o Wazir Singh & others [1939] 6 EACA 145 in support.

53. The identification of the appellant by these young boys is what led to the arrest of the appellant. Infact when police went for him they found he had disappeared and left the sheep unattended. That also points to his insincerity.

    All this evidence put together confirms that PW1 and PW2 were defiled by the appellant.

54. The appellant has raised issue about sentence. He relied on a Court of Appeal decision in Evans Nyamari Ayako (supra). In the recent decision of Republic v Mwangi; Institute for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) Petition No. E018 of 2023 [2024] KESC 34 (KLR) 12 July 2024) (Judgment), the Supreme Court considered the constitutionality of the minimum sentences under the *Sexual Offences Act* and categorically held that the same are constitutional and the courts must impose the same unless and until they are declared unconstitutional.

    Also see Charles & another v Republic (Criminal Appeal No. 38 of 2019) [2024] (Judgment) [2024] KECA 1902 KLR by the Court of Appeal. This means the decision cited by the appellant is no longer applicable.

55. It is noted that these decisions by the Supreme Court and the Court of Appeal are binding on this court. The court will therefore not interfere with the sentence that was imposed by the trial Magistrate.

56. Besides imposing the sentence the learned trial Magistrate made an order that the sentences shall run concurrently. The offences here were not committed in one day and in one transaction. These were two distinct offences committed on separate dates and to two different victims. Therefore the sentences cannot run concurrently. However given the nature of the sentences they cannot also run consecutively.

57. I therefore set aside the order for the sentences to run concurrently and order that the sentence in the 2nd count shall be suspended.

    Besides that I find that the appeal lacks merit and is hereby dismissed. The conviction and sentence are upheld.

58. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 6TH DAY OF AUGUST, 2025 IN OPEN COURT AT NAKURU.

H.I. ONG'UDI

JUDGE