



REPUBLIC OF KENYA



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**Milango v Republic (Criminal Appeal E021 of 2024)
[2025] KEHC 11808 (KLR) (6 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11808 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E021 OF 2024
HI ONG'UDI, J
AUGUST 6, 2025**

BETWEEN

EVANS MURIITHI MILANGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment delivered by Hon Yusuf Barasa
Muklula in Naivasha CMCR Case (SO) No. E002 of 2023 on 6th August, 2024)*

JUDGMENT

1. Evans Muriithi Milango hereinafter referred to as the appellant 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 were that the appellant between the year 2020 and 15th November, 2022 in [Particulars withheld] area in Naivasha sub-county within Nakuru county intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely vagina of A.N. M a girl aged 13 years. He faced an alternative count of indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
2. He denied the charges and the case proceeded to hearing. The prosecution called six (6) witnesses while the appellant gave a sworn defence and called two (2) witnesses. Thereafter the trial Magistrate delivered the Judgment on 6th August, 2024. He convicted the appellant on the main count and sentenced him to twenty (20) years imprisonment.
3. Being aggrieved with the Judgment he filed this Appeal on the following grounds:
 - a. That this appeal be allowed
 - b. The Appellant's sentence of twenty (20) years imprisonment be set aside



- c. The Judgment of the trial court delivered on the 6th August, 2024 be quashed.
4. The evidence presented by the prosecution was in the following manner. PW1 said she was born in 2009 (EXB 1). She said the defiling started in the year 2020 at night. She lived with the appellant, her mother (PW2) and her kid brother in a single room partitioned by a curtain. PW1 and her brother slept on a chair while the appellant and PW2 slept on a bed. At night the appellant would raise the volume of the TV and come to her with a knife and force her to have sex with him. She would wake up and find him on top of her. She remembered him defiling her on 15th December, 2022.
 5. Before they closed school for the 3rd term her teachers called her to ask what was happening to her at home. She said her parents were not relating. She further told them how the appellant used to defile her. She knew him as her father. PW2 was later called to school and was informed. PW1 was then taken to hospital after reporting the matter to Kongoni police station. She identified the P3 form and PRC form (Exb 2 and 3).
 6. In cross examination she said when all this happened her mother (PW2) was in the house but asleep. That in 2020 they lived with the grandmother but when the appellant reconciled with PW2 he took her in. He provided for all her needs. She had never told PW2 what was happening until when she was taken to hospital.
 7. PW2 – LN is the mother to PW1. She stated that she was called to [Particulars withheld] Primary School where PW1 schooled. She was shocked to learn that the appellant used to sexually abuse his daughter (PW1). She took PW1 to hospital with a letter from the school. It was then that PW1 opened up to her. She confessed that the appellant was not the biological father of PW1. She denied framing the appellant despite their small domestic issues. She produced the birth certificate (PEXB 1) showing she was born on 28/10/2009, and the appellant was the father.
 8. In cross examination she said she never knew what used to happen in the house. She claimed that the appellant used to spray chemicals on her which made her fall asleep. She told the court that said she did not return to the appellant's house after this.
 9. PW3 JMW a teacher at [Particulars withheld] Primary School formerly at [Particulars withheld] Primary School said on 15th November, 2022 they had a discussion with one of the girls (victim) whom they had noticed was always absent minded and was not going home. PW3 did this as he was in charge of guiding and counselling. After the discussion the girl confessed that she used to be sexually harassed by her father. The matter was escalated to the headteacher. PW1's mother (PW2), grandmother and pastor were called. PW2 said she had no idea that was happening to PW1. PW3 identified the appellant as the father of PW1.
 10. In cross examination he said he addressed pupils' issues. The case was not investigated by the teachers. He denied framing up the appellant.
 11. PW4 Benjamin Kuria is a Clinical Officer in charge at Naivasha subcounty referral hospital. He examined PW1 on 24th November, 2022 and found her to have no injuries on upper head and legs. On the genitalia she had lost her virginity, and the hymen was old broken with a whitish smelly discharge. He confirmed that the findings were consistent with defilement. He produced the P3 form (PEXB 2).
 12. In cross examination he said the time of incident was not indicated in the P3 form (P EXB 2). The hymen was not freshly broken. He said he did not treat PW1. He only filled the P3 form (PEXB 2). He identified a P3 form (DMFI1) as originating from their hospital.



13. PW5 – Eliud Kabura, clinical officer Naivasha District hospital produced the PRC form (PEXB 3) in respect of PW1 whom they examined on 23rd November, 2022. The findings are similar to those in PEXB 2.
14. In cross examination he said the history revealed that the defilement started long ago. That the penetration was by finger and then penis. PEXB 3 was filled before PEXB 2.
15. PW6 – No. 117909 P. C Linus Yegon of Kongoni police station crime duties said on 20th November, 2022 PW1 and PW2 came to the station and reported a case of defilement. He issued them with a P3 form and sent them to the Naivasha District Hospital. They returned on 24th November, 2022 with the filled form (PEXB 2) and he recorded their statements. PW1 explained to him what the appellant had been doing to her before her school got concerned. The appellant disappeared but was arrested and charged after 1½ months.
16. In his sworn defence the appellant, denied all that PW1 told the court. He produced a letter relied on by the hospital (DMFI 1) as D EXB1. He produced a P3 Form and Post Rape Care Form as D EXB 2 and 3. He stated that the documents show that when PW1 came back they took her to hospital. He said on 5th – 7th (sic) PW1 never went to school and she had a tendency of having sex.
17. He said PW2 was promiscuous and she should have been the first to know that PW1 had an issue. That PW3 did not say who they had a meeting with. He seemed to blame PW2 and her mother for all this. He denied having disappeared as he had the shop and other projects which he ran.
18. In cross examination he said PW1 was well mannered and truthful when she came with her mother. He argued that PW1 lied having been coached by PW2 and grandmother. That PW3 also lied. He said the P3 form he produced for 2021 (EXB 2) showed PW1 had been defiled. He never asked PW2 about the extra marital affairs. He also stated that on 15th November, 2022 he was in Nairobi.
19. DW2 – Wilson Waweru Njeri was the appellant’s employee in his shop from January, 2020 when PW2 was not at home. He therefore stayed with the appellant and that in November, 2022 PW2 left and told them they would see. On 25th November, 2022 PW2 came back and dismissed him. He was later paid his dues by the appellant. In cross examination he said he did not know where appellant was on 15th November, 2022.
20. DW3 Joseph Kamau is a driver and a businessman. He knew the appellant as a fellow business man. He said in 2020 the appellant called him to his home to settle a dispute between them. He went but he did not find his wife (PW2). He sat with elders and he talked with the appellant about his business. While in Gilgil he learnt of the appellant’s arrest on an allegation of defiling a child. In cross examination he said he knew nothing about what might have happened at the appellant’s home.
21. The appeal was canvassed through written submissions

Appellant’s submissions

22. These were filed on 26th May, 2025. The appellant referred to the evidence of PW1 and PW2 and wondered why PW2 could not hear what allegedly went on between him and PW1. Further that PW2 never reported anywhere of her having been defiled by him. He relied on the case of David Jairo & another V Republic Criminal Appeal No. 515 of 2007. He wondered why PW2 had never noted PW1’s stress if it was true. He raised issue with PW2’s allegation that she had been sedated by a chemical by him.



23. He wondered if there was any truth in what PW1 told the court. That the trial court never tried to get any evidence to corroborate her evidence. He submitted that he was never supplied with the witness statements and other documents. Reference was made to the case of *Thomas Gilbert Cholmondeley V Republic* [2008] eKLR where the court of Appeal stated:

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the necessary materials such as copies of statements or witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items”.

He thus submitted that he was never prepared to proceed which prejudiced him. He wondered why he was never given a chance to make final oral submissions before the court. That his alibi defence was never displaced by the prosecution. It was his submission that penetration was never proved. He urged the court to allow the appeal

Respondent’s submissions

24. The same were filed by M/s Sharon Koina Principal prosecution counsel and are dated 1st March, 2025. On penetration counsel referred to section 2 of the *Sexual Offences Act* on the definition of penetration. Counsel referred to the evidence PW1, PW4 and PW5 on this and submitted that the same had been proved. For age, she referred to PW2’s evidence and the birth certificate (PEXB 1), which was never refuted.
25. On identification she submitted that the appellant and PW1 knew each other well. This was confirmed by PW1 and PW2 and the latter confirmed that the appellant was PW1’s father. That the trial court noted that the appellant was the only male adult in the house who could have committed such an offence and therefore there could be no possibility of a mistaken identity.
26. She thus submitted that all the ingredients of an offence of defilement were proved to the required standard. She urged the court to uphold the conviction and lawful sentence of twenty (20) years, and dismiss the appeal.

Analysis and determination

27. This being a first appellate court, it is called upon to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion. It must also bear in mind that unlike the trial court it did not have the opportunity to hear or see the witnesses testify and so should give an allowance for that. See *Okeno V Republic* 1972 EA 32. In *Kiilu and another V Republic* [2005] I KLR 174 the Court of Appeal held thus:
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.



28. I have carefully considered the record of appeal, grounds of appeal, submissions by both parties, cited authorities and the law. The main issue I find falling for determination is whether the charge of defilement was proved to the required standard against the appellant.
29. Before this court proceeds to do the analysis of the grounds of appeal, there is an issue noted from the record which issue must be addressed first. The appellant herein was initially charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act*. The appellant who was unrepresented denied the charge as well as the alternative count of committing an indecent act with a child contrary to section 11(1) of the said Act. This was on 20/01/2023.
30. The hearing took off on 12th June, 2023 with two witnesses, PW1 (victim) and PW2 (victim's mother) testifying. After PW2 was through with cross examination and the prosecution was given a chance to re-examine this is what transpired:

M/s Rukungu (Prosecutor):

“No re-examination. I pray for another date and leave to amend the charge sheet”

Accused person:

“No objection”

Court:

“Application to amend charge sheet is allowed. Mention on 26/6/2023”.

31. The prosecutor never explained to the court what had prompted the request for amendment. It is not even indicated what the amendment was all about, but the court went ahead and granted leave for amendment. On 26/6/2023 this is again what transpired

M/s Rukungu:

“I have the amended charge sheet”

Court

“Amended charge sheet read out to the accused person”

Accused person:

“Si kweli”

Alternative charge

“Si kweli”

Court:

“Plea of not guilty entered in the amended charge sheet. Bond terms to remain the same.

Amended charge sheet to be supplied to the accused person”

M/s Rukungu:

“I make an application to recall the prosecution witnesses.



Court:

“The prosecution witnesses to be recalled. Hearing on 24/10/2023”

On 24/10/2023

M/s Rukungu:

“My witnesses are not available. I pray for a mention date”

Accused Person

“No objection”

RULING

Since the prosecution witnesses are not available, matter is adjourned. Summons to Dr. Ben Kuria is extended and Eliud Kabura. Hearing on 11/12/2023.

32. At the next hearing on 11/12/2023 a new witness PW3 – JMW appeared and testified. On 8/4/2024 PW4 Benjamin Kuria and PW5 Eliud Kabura testified. On this same day after PW5 had testified the prosecution (M/s Rukungu) stated: “No re-examination. I wish to make an application to recall PW2 for purposes of producing the birth certificate”
33. PW2 was then recalled and only produced the birth certificate. Thereafter PW6 testified and the prosecution closed its case. Section 214 Criminal Procedure Code deals with amendments of charge. It provides as follows:
 1. Where at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case:

Provided that:

 - i. Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge.
 - ii. Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross examined by the accused or his advocate, and in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.
34. In this particular case the appellant had initially been charged with incest contrary to section 20(1) of the *Sexual Offences Act*. Two witnesses testified before the prosecution applied to amend the charge, without giving the explanation. The new charge was defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. Most importantly the prosecution requested for leave to recall the witnesses but she never recalled them as directed. PW2 was only recalled on 28th May, 2024 to produce the birth certificate and not as per the orders of 26th June, 2023. PW1 who was the key witness was never recalled.



35. The omission by the trial court to recall the witnesses after a major amendment of the charge and after issuing orders to that effect was a serious one. The appellant ought to have had the witnesses recalled for him to cross-examine them in view of the amended charge or even have the witnesses testify afresh. Article 50(2) (c) of *the Constitution* of Kenya 2010 provides:

“Every accused person has the right to a fair trial which includes the right –

- (c) to have adequate time and facilities to prepare a defence.
- (k) to adduce and challenge evidence.

36. The above provisions of *the Constitution* were not complied with which makes these proceedings amount to a mistrial. This court does not therefore deem it necessary to deal with the rest of the appeal on its merit. There is no need of going beyond this to consider the rest of the evidence on record to make a conclusion as the trial was a nullity.

37. The next issue for determination is whether to order for a retrial or quash the conviction.

38. In the case of Samuel Wahini Ngugi V Republic [2012] eKLR the Court of Appeal gave guidance on this:

“Each case must depend on the particular circumstances of the case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.”

Also see

- i. FWM V Republic [2017] eKLR
- ii. Mwangi V Republic [1983] KLR 522

39. The appellant first appeared in court on 20th January, 2023. The matter was heard and judgment delivered on 6th August, 2024. Not much time has been wasted. It would therefore be in the interest of Justice to both parties that the matter is heard afresh.

40. In the circumstances the appeal partially succeeds and the following orders shall issue

- i. The conviction and sentence of 6th August, 2024 are set aside.
- ii. A re-trial is hereby ordered.
- iii. The appellant to be presented to the OCS Kongoni police station immediately for drafting of fresh charges
- iv. Appellant to be arraigned before the Chief Magistrate Naivasha Magistrate’s Court for plea taking on 11th August, 2025. The case should be heard and concluded within 12 months.

41. Orders accordingly.

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

H. I. ONG’UDI

JUDGE

