Mwaka & another v Republic (Criminal Appeal E083 of 2023)
[2025] KEHC 17893 (KLR) (27 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17893 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E083 OF 2023

EN MAINA, J

NOVEMBER 27, 2025

BETWEEN

MWENDWA MWAKA ..... 1ST APPELLANT

VICTOR KAMANDE WAMBUA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment delivered in the Machakos Magistrate's Court Sexual Offence case No. 33 of 2020 by Hon. H.M. Mbati, Principal Magistrate on the 7th December 2023)

JUDGMENT

1. The appellants herein were charged with separate counts of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual offences Act*.

2. The particulars of the charges against the appellants were that on 27th May 2020, at Kwa Musakwa village, Mathunthini sub location, Makutano Location, Mwala Sub County within Machakos County, each of them intentionally and unlawfully caused his penis to penetrate the vagina of EWN, a child aged 16 years.

3. They also faced separate alternative counts, of committing an indecent act with child (complainant) contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars of the alternative counts were that on the same date and place they each intentionally and unlawfully caused their penis to penetrate the vagina of EWN a child aged 16 years.

4. Both appellants pleaded not guilty to the charges whereupon the prosecution called six witnesses to prove its case. After considering the evidence of the witnesses the learned magistrate found the appellants had a case to answer and put them on their defence. The appellants elected to give

evidence on oath and to call four witnesses. Upon evaluating the evidence by both sides, the learned magistrate found the appellants guilty on the main counts, (defilement), and sentenced each of them to imprisonment for fifteen years.

5. Being aggrieved the appellants preferred this joint appeal in which they cite the following amended grounds;

> "a. a. That the learned trial magistrate erred in law and fact by convicting the accused person on a defective charge.
>
> b. That the learned trial magistrate erred in law and fact by failing to establish and prove the ingredients of the offence charged to the required standard.
>
> c. That the learned trial magistrate erred in matters of law and fact by failing to properly evaluate the evidence on record and relied on insufficient contradictions, inconsistencies, uncorroborated and incredible evidence hence came to the wrong conclusion.
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> d. That the learned trial magistrate erred in law and fact as there was procedural irregularities and disregarding credible alibi defenses.
>
> e. That the learned trial magistrate imposed a sentence of fifteen (15) years imprisonment which is manifestly excessive."

6. The appeal was canvassed through written submissions. The Appellants filed joint submissions which are dated 17th April 2025. Briefly, the appellants submitted as follows; firstly, that the charge sheet was defective as there was no difference between the particulars in the main charge and the particulars in the alternative charge. They contended that the particulars should have been framed accurately and in the manner the offences are constructed in the Act. That the misdescription violated their right to fair trial and rendered the charges fatally defective.

7. Secondly, the appellants argued that the ingredients of the offence of defilement were not proved to the standard required in that firstly, in regard to the age of the victim, the charge stated she was sixteen years old but at the trial she herself stated she was seventeen and other evidence adduced also alluded to the fact that she was seventeen. They submitted that this contradiction begs the question of exactly old the victim was. They contended further, that given her date of birth in the certificate of birth she was in fact eighteen and not sixteen as alleged.

8. On the element of penetration, it was their contention that given the victim's description of what occurred, penetration did not take place; that she testified that there was a struggle and distraction by footsteps after which she hid in a bush. They argued that what could have occurred was an attempt to commit the offence of defilement as the offence could not have been completed when the victim ran away. The appellants also submitted that the medical evidence ruled out any evidence of penetration as no spermatozoa were seen. They rightly submitted that the absence of a hymen is not of itself proof of penetration and urged this court to carefully weigh the testimony of the victim against the medical evidence and find that penetration was not proved beyond reasonable doubt.

9. On identification, the appellants submitted that the victim was categorical that she only knew the 1st Appellant but not the 2nd Appellant; that the evidence of identification was marred by inconsistencies and the court did not consider how their hearing disability and reliance on sign language might have caused the confusion. The asserted that in defilement cases evidence of identification must be watertight especially where some disability or communication barrier exists.

10. The appellants further submitted that there were inconsistencies especially in the testimonies of the victim and PW6 in respect to the date of the offence and what was at the scene of the crime.

11. Further, that there were procedural irregularities; that during the arrest, the language used was not specified bearing in mind that the Appellants are people living with disability, that is deaf and dumb and that the trial process was prolonged due to interpreter unavailability and that their alibi defences were ignored.

12. On the sentence, the appellants stated that the same should have taken their disability and the time spent in remand custody into account. In support of their submissions, the appellants relied on the cases of Idah Nziza Kikubu & Another vs Republic , Criminal Appeal no 30 and 31 of 2021, Jason Akumu Yongo vs Republic, Criminal App no 1 of 1983, Burunyi and another vs Uganda 1968 EA 123, Ahmed Summar vs Republic (1964) EA 48 Sigilani vs Republic (200,4) Eklr, Kaingu Elias Kasomo vs Republic, Malindi Court of Appeal Criminal 504 of 2010, Chargoi vs Republic [2016] e KLR, Daniel Kiplimo Cherono vs Republic [2014] e KLR, Sekitoliko vs Uganda (1967) EA, Joseph Owuor Onyango vs Republic [2014] e KLR, Republic vs Erick Otieno Oyugi [2017] e KLR, Richard Munene vs Republic [2018] e KLR, Kimani Ndungu vs Republic (1979) e KLR, Philip Nzaka Watu vs Republic (2016) eKLR, David Mwita Wanja vs Republic [2018] e KLR, Dismas Wafula Kilwake vs R [2019] e KLR, Kaurucho vs Republic [2023] KEHC 26063 (KLR) and Joshua Gichuki Mwangi vs Republic, Criminal Appeal no 84 of 2015.

13. For the Respondent, it was submitted that all the ingredients of defilement were proved; that age was proved through the testimony of the victim and corroborated by the birth certificate tendered as an exhibit; that the element of penetration was also proved to the standard required through the evidence of the victim as well as medical evidence; that the element of identification of the appellants as the perpetrators of the offences was also proved beyond reasonable doubt. Prosecution Counsel submitted that the case against the 2nd appellant was of recognition as he was known to the victim prior to the commission of the offence and further because the victim had ample eye contact with the appellants as they assailed her.

14. As for the error in the particulars of the charges, learned prosecution counsel cited Section 382 of the Criminal Procedure Code and submitted that the appellants were convicted on the main charge which was not defective. Counsel further submitted that the prosecution had discharged its burden of proving the charges against the appellants beyond reasonable doubt. Counsel stated that the evidence of the prosecution witnesses was consistent and the appellants defence did not rebut that evidence.

15. On whether or not the appellant's right to fair trial was violated Counsel contended that the learned magistrate went out of her way to ensure the appellants were given a fair trial; that they were not prejudiced by the fact of hearing impairment; that there was a sign language interpreter throughout the trial and they had legal representation. Counsel argued that disability is not inability and no evidence was adduced to support their notion that they could not be accommodated in the prison. Counsel asserted that it would be bad jurisprudence for this court to conclude that the appellants should be treated leniently merely due to their hearing impairment.

16. Lastly, Counsel submitted that the sentences imposed were within the law and were neither harsh nor excessive.

17. In support of the respondent's submissions, counsel cited the following cases; Charles Wamukoya Karani vs Republic, Criminal Appeal no 72 of 2013, Francis Omuroni vs Uganda ,Criminal Appeal No 2 of 2000, Bassita vs Uganda SC criminal Apepal no 35 of 1995, Mwaura Mfaume vs Republic [2014] e KLR, KOO vs Republic , Criminal Appeal no 62 of 2019, Peter Ngure Mwangi vs Republic

[2014] e KLR, Miller vs Minister of Pension [1947] 2 Aller 372, Wanjema vs Republic [1971] EA 494, SC Petition no E018 of 2023, R vs Joshua Gichuki Mwangi and 4 others.

Analysis and determination.

18. As the first appellate court, I have carefully considered and evaluated the evidence adduced in the trial court so as to arrive at my own independent conclusion, albeit keeping in mind that unlike that court I did not see or hear the witnesses-see the case of Okeno v Republic [1972] EA 32. I have also considered the rival submissions, the cases cited thereat and the law.

19. The Appellants herein were charged and convicted on separate counts of the offence of defilement contrary to Section 8(1) as read together with 8 (4) of the *Sexual offences Act*. It was alleged that they committed the offences separately though in the same transaction. The sections which prescribe the offences for which they were convicted state:

    8. "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

20. The elements of the offence are therefore that the victim is a child and the child's age for purposes of the sentence; proof of penetration, and identification of the perpetrator.

21. In regard to the age of the victim, the Court of Appeal stated as follows in the case of Edwin Nyambogo Onsongo vs. Republic (2016) eKLR-

> "... 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."

22. In this case the age of the victim was proved through a birth certificate which prima facie is the best proof of age. The birth certificate states that the victim was born on 29th August 2003. This means that as at the commission of the offence she was just a few months shy of her seventeenth birthday. She would have turned seventeenth in August of 2020 and this offence was committed in May. She was therefore still a child as defined in Section 2 of the *Children Act*. By the time she gave evidence she was already seventeen which explains why she stated she was seventeen. the age that is relevant to the charge is the age at the time the offence was committed but not that as at when the victim testified. Nothing much therefore turns on the argument that the charge sheet indicated that she was sixteen but her evidence was that she was seventeen. In my view there was no notable contradiction as would lead this court to conclude that age was not proved beyond reasonable doubt.

23. In regard to the element of penetration, Section 2 of the *Sexual Offences Act* defines the same as the partial or complete insertion of the genital organs of a person into the genital organs of another person. Genital organs are on the other hand defined as to include, the whole or part of male or female genital organs and for purposes of this Act includes the anus.

24. In this case the victim (PW1) testified that on the material day at about 5pm, she was on her way home after returning a calculator she had borrowed from her friend when she saw the appellants ahead of her.

She stated that she knew the 2nd appellant as she had met him before at the home of the Assistant Chief and they had been introduced to each other. She stated that when she overtook them the 1st appellant stayed behind her while the 2nd appellant walked past her and she was sand-witched between them. She stated that she became scared and was debating whether to retreat. She described what happened next as follows; " As I walked A1 rushed to me and grabbed my hand and then A2 appeared and strangled me and drugged me to the bush. At the thicket they forced me on the ground. I struggled and they overpowered me. A2 punched me on the chest, he removed his shirt and strangled me with it. I screamed and he put force. A2 open(sic) my blouse and removed my bra and started touching me. I then heard footsteps and they left me. I ran only for A1 to give chase and they placed me on the ground and A2 strangled me. I saw them communicate by sign language. I saw A1 remove a condom and place it on his manhood and then defiled me...

> I struggled, A2 wanted to put his penis on my mouth and I put my hand to my mouth. He hit me on the chest. I told them to do as they wished. I know them. A1 stepped away. A2 raped me. A1 held me down. I heard again footsteps. It was 600pm. I escaped and hid in a bush. I saw them pass me. I went and hid in a hilly area. I could see them look for me till they left. I went back to the position looking for my clothes. I didn't find them. I stayed there till 700pmand I went home...."

25. Whereas her evidence needed no corroboration. There was evidence from PW5, a Clinical officer, which corroborated it. PW5 produced a P3 and PRC form and testified that she examined the victim after the incident and her findings were as follows;

> " Upon examination, I found strangulation marks wound the neck, bruising effect noted left/ right thighs, left knee swollen and tender. She had vaginal bleeding she was on her menses. Normal external virginal noted. No features of tears. Hymen not intact minimal bruising noted on left minor.
>
> ....
>
> I concluded patient had been defiled."

26. It is my finding that the, corroboration of the victim's evidence by PW5, demonstrates that the victim was a truthful witness and that her evidence was credible and trustworthy. The absence of spermatozoa is never of itself fatal to a charge of defilement as even partial penetration suffices to prove the offence. Moreover, the victim's evidence was that one of the perpetrators used a condom. The appellants also suggested that they could not have committed the offence because according to the victim she heard footsteps and ran away; that therefore, the offence was not completed. It is however instructive that the victim was clear that the 1st appellant ran after her and recaptured her and he and the 2nd appellant proceeded and defiled her. By the time she heard footsteps a second time they had had their way with her and when she escaped it was without her clothes. PW2 confirmed that the complainant went home limping and crying and when she told her what had happened, they told their brother PW4 who took her to the Ass Chief to report. On her part the Ass Chief (PW6) confirmed that the victim's clothes were taken to her by someone who found them in his shamba.

27. The victim's description of what the assailants did to her and the events that took place before, during and after the incident were so graphic that it leaves no doubt in my mind that she was speaking the truth. Her evidence also received more than enough corroboration from other evidence even though such corroboration was not necessary in view of Section 124 of the *Evidence Act*. I have considered the evidence of the accused persons and I am not satisfied that it offers any rebuttal to the very cogent

evidence of the prosecution witnesses. I find that the element of penetration was proved beyond reasonable doubt.

28. The third element is identification. PW1 told the court that she knew the 1st Appellant as they had met at Mumbua's, the daughter of the Assistant Chief and after the incident, she went with her brother to the 1st Appellant's house where they found his mother and told her what had transpired. It is also not lost to this court that the offence occurred at about 5pm hence in broad daylight and thus the circumstances were favourable to a positive identification. Concerning the 2nd accused she stated that although she did not know him, she had sufficient eye contact with him to identify him. I am satisfied that the length of time the appellants took with her, coupled with the fact that it was in broad daylight was enough for her to positively identify the 2nd appellant. Her evidence was so strong that it displaces any alibi that may have been brought forth by the appellants.

29. I have no doubt that the victim was defiled and that she was defiled by the appellants. Her evidence that she had left the house to return a borrowed calculator was corroborated by PW2. PW3 also testified that she saw her after the ordeal and that she observed that she was limping. This confirmed to this court that PW2 was telling the truth. I found her a truthful and trustworthy witness.

30. In respect to the submission that the charge was fatally defective, I agree with prosecution counsel that the charge for which the appellants were convicted were not defective. What was defective were the alternative charges as their particulars were in the exact words as the main counts. The main counts were drawn as provided in the law and were not irregular or defective. In any case, even the defects in the alternative counts would have been curable under Section 382 of the Criminal Procedure Code which states-

> "
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> " 382. . Finding or sentence when reversible by reason of error or omission in charge or other proceedings.
>
> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

31. Further, the appellants were provided with a sign language interpreter and were represented by an advocate during the entire trial and so suffered no prejudice for reason of their disability. It is my finding that there is no evidence that their right to fair trial was compromised and that ground of appeal must also fail.

32. As regards the sentence, Section 8 (4) prescribes a sentence of imprisonment for a term of not less than fifteen years. It is now trite that the courts cannot impose a sentence of less than the term prescribed- see the case of Joshua Gichuki vs Republic (Petition E018 of 2023) [2024] KESC 34 (KLR) where the Supreme Court of Kenya stated;

> " 56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law.

> Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.57.In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities."

33. In this case, the Appellants were sentenced to imprisonment for 15 years each. The sentences were the minimum provided by the law and the were therefore lawful. They cannot be described as either harsh or excessive. To the contrary it is lenient given the ordeal the victim went through in the hands of the appellants including being strangled with a shirt, a fact which was corroborated by the medical evidence adduced.

34. This court was asked to take into account that the Appellants have a hearing disability and hence cannot fit in prison. In this regard Clauses 20:21 to 20:24 of the Sentencing Policy state as follows;

> "20. 21 Article 54 of *the Constitution* recognises the right of persons with disability to be treated with dignity129 and to have reasonable access to all places.130 Further, article 29 (f) recognises the freedom from cruel, inhuman or degrading treatment.131 Article 14 of the UN Convention on the Rights of Persons with Disabilities requires States to ensure that persons who are detained are accorded reasonable accommodation.
>
> 20. 22 These have a bearing on the sentences imposed upon offenders with disability. The sentence imposed must not amount to cruel, inhuman or degrading treatment in view of the disability and the facilities available in respect to custodial sentences.

Situational Analysis

20. 23 The prisons infrastructure does not accommodate persons with disability humanely. In effect, where the extent of disability is high, the offenders suffer undue hardship and in some cases it amounts to inhuman and degrading treatment. There is need to enhance accessibility and accommodation for disabled persons in prisons.

Policy Directions

20. 24 When imposing sentencing orders against offenders with disability, the court should be mindful to ensure that the sentence imposed does not amount to an excessive punishment in view of the extent of disability and in light of the offence committed. In particular, the court should ensure that the sentence imposed does not amount to a cruel, inhuman or degrading treatment in view of the extent of disability of the offender."

35. I have considered the circumstances of this case. Other than that the appellants have a hearing disability they do not suffer any severe disability as would compromise their health or prevent them from fitting into the correctional facility to which they were sent to serve their sentences. Their imprisonment is not in violation of their rights or the Sentencing Policy. As convicted persons serving sentence their rights are guaranteed by *the constitution* and should there be a breach, they are at liberty to seek redress before this or any other court.

36. I have said enough to show that the appeal has no merit. The same is dismissed in its entirety and the conviction and sentences imposed by the learned magistrate are upheld.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF NOVEMBER 2025.

E. N. MAINA

JUDGE

In Presence Of:

Ms Kaburu for the State

C/A- Geoffrey

Allan Muthui Gichohi (sign language interpreter)

Both Appellants

Language – sign language