

KENYA / JUDGMENT

Mwalimu v Republic

[2026] KEHC 13491 (KLR)

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COURT

High Court

BEFORE

JWW Mong'are

CASE / FILE NUMBER

Criminal Appeal E073 of 2025

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Mwalimu v Republic (Criminal Appeal E073 of 2025) [2026] KEHC 13491 (KLR) (10 September 2026) (Judgment) Neutral citation:

[2026] KEHC 13491 (KLR) Republic of Kenya In the High Court at Machakos Criminal Appeal E073 of 2025 JWW Mong'are, J September 10, 2026 Between Alex Kitau Mwalimu Appellant and Republic Respondent (Being an appeal against the original conviction and sentence of Hon. P.E Nabwana, SRM dated 12th August 2025 at the Magistrates Court at Wamunyu, Sexual Offence Case No. E018 of 2024)

Judgment

Introduction and Background 1. Before the subordinate court, the Appellant was charged with the offence of Defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act (Chapter 63A of the Laws of Kenya). The particulars were that the Appellant, on 11 th October 2024 at [Particulars Withheld] village in Machakos county, intentionally and unlawfully caused his penis to penetrate the vagina of TW, a child aged 17 years. The Appellant was also alternatively charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act and the particulars stated he intentionally touched the buttock, breast, and vagina of TW with his penis. 2. The Appellant was arraigned and pleaded not guilty to both charges and the trial proceeded with the Respondent (“the Prosecution”) calling four witnesses; Kennedy Munyao, a Clinical Officer working at Mbiuni Health Center (PW 1), TN, TW’s mother (PW 2), TW herself (PW 3) and 7xxx1 Sgt. Paul Kamau Mwangi, a police officer based at Mbiuni Police Station (PW 4). The Appellant then testified in his own defence (DW 1). 3. After hearing the case, the subordinate court rendered a judgment on 12 th August 2025 where it found the Appellant guilty of the main charge of defilement and convicted him. He was then sentenced to fifteen (15) years imprisonment as the mandatory minimum sentence prescribed by section 8(4) of the Sexual Offences Act . The sentence was ordered to run from 14 th October 2024, the date of his first arraignment. It is this decision that the Appellant has appealed against through grounds

set out in his Petition of Appeal dated 25 th August 2025. The appeal was canvassed by way of written submissions which I have considered together with the record and I will be making relevant references to them in my analysis and determination below.

Analysis and Determination

4. As submitted by the Appellant, as this is the first appellate court, the predecessor of the Court of Appeal in *Okeno v. R* [1972] EA. 32, laid down the court's duty. It is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions 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 conclusions as those of the lower court. It may rehash those conclusions and there is nothing 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 decision (Also see *Wairimu v Republic* (Criminal Appeal 28 of 2009) [2010] KECA 495 (KLR))
5. In his Petition of Appeal, the Appellant appeals against both the conviction and sentence and he has raised eight main grounds in his written submissions, challenging the trial court's decision. He contends that TW's age was not conclusively proven due to inconsistencies and the absence of a birth certificate and that the medical evidence was inconclusive as there were no injuries and spermatozoa and it did not conclusively prove penetration by the Appellant. He claims T. W's testimony was obtained through force and coercion at the police station, violating her constitutional rights and making the evidence inadmissible and that she was a hostile and refractory witness due to her contradictory testimony and reluctance to testify and that the court erred in relying on her evidence without proper procedure.
6. The Appellant points to several contradictions in the Prosecution's evidence, such as discrepancies in TW's story, the time of disappearance, the language of the proceedings and statements from different witnesses. He avers that the trial court failed to properly consider the Appellant's defence, which raises the issue of consent and the existence of another boyfriend who could be responsible for the pregnancy. The Appellant submits that the Prosecution failed to conduct a DNA test to link him to the pregnancy, which creates a reasonable doubt and that the judgment is defective for not providing a detailed analysis and reasoning for the conviction as required by the Criminal Procedure Code (Chapter 75 of the Laws of Kenya).
7. The Appellant further submits that the 15-year minimum sentence is harsh, disproportionate and the trial court failed to exercise discretion considering his mitigation. For these reasons, the Appellant prays that the Court allows his appeal, quashes the conviction, sets aside the sentence and orders his immediate release.
8. In response, the Prosecution submits that it proved all elements of the offence beyond a reasonable doubt in that the age was proven by the age assessment report, penetration by TW's own admission and that the pregnancy test and other medical evidence and identification was not in issue as the Appellant was known to TW. It asserts that the Appellant was accorded a fair trial, as he was properly arraigned, given all disclosures and afforded the right to cross-examine witnesses and present his defence. It submits the

sentence of 15 years is lawful as it is the minimum sentence prescribed by the Sexual Offences Act and is in line with the recent Supreme Court decision in *Petition E018 of 2023* affirming the constitutionality of mandatory minimum sentences. For these reasons, the Prosecution urges the court to dismiss the appeal and uphold both the conviction and sentence. 9. The parties agree that to sustain a conviction for the offense of defilement, three ingredients must be established by the Prosecution; that the complainant was a child; that there was penetration and that the Appellant was the perpetrator of the offence (see *Odera v Republic* [2026] KECA 1655 (KLR)). I find that the trial court was properly guided on the same. On the age of T.W, the Prosecution produced an Age Assessment Report (P Exh. 4) from Machakos County Referral Hospital which stated TW was 16 years old in March 2025. This was corroborated by TW herself who stated she was 17 years old and the Investigating Officer, PW4 who stated that he relied on the Age Assessment Report. It should not be lost that the age of a minor victim of sexual violence can be proved by way of medical documents, birth certificates, victim's own or her parents' and or guardians' evidence, common sense as well as by simple observation (see *Kaburu v Republic* [2022] KECA 789 (KLR)). I find that the age of T.W was lawfully assessed to be 16 years as per the Age Assessment Report. Whereas the Appellant submitted that the age was confusing because the charge sheet stated 17 years while the Age Assessment Report indicated 16 years and no birth certificate was produced, I am in agreement with the trial court that these minor discrepancies do not create a fatal doubt. As stated, the law does not require a birth certificate as the only form of proof and courts accept age assessment reports, oral evidence from parents and even medical evidence as credible forms of proof Both ages of 16 and 17 fall squarely within the bracket of section 8(4) of the Act which is "...between the age of sixteen and eighteen years...". I therefore find that the trial court correctly interpreted and applied the law on proof of age and I conclude that the ingredient of age was proven beyond reasonable doubt. 10. On penetration, although initially recanting, TW unequivocally admitted in court that "It is true we had sex on that day" and that the Appellant was her boyfriend. PW 1 testified that TW was found to be pregnant. The pregnancy test and the HVS results, along with the filled P3 form and treatment notes, were produced as evidence. A positive pregnancy test is indeed a powerful indicator of penetration. Further, PW2's and PW4's evidence corroborated the sequence of events leading to the discovery of TW at the Appellant's house after spending the night. The Appellant's argument that the absence of spermatozoa and injuries to the genitalia means penetration was not proven is fundamentally flawed as the definition of "penetration" under section 2 of the Sexual Offences Act is "...the partial or complete insertion of the male genital organ into the female genital organ." The law does not require the hymen to be broken, nor does it require the presence of spermatozoa. Medical evidence, while corroborative, is not the sole basis for proving the act. T.W's direct testimony and her resulting pregnancy are sufficient and furthermore, PW 4's evidence that TW stated the sex was unprotected corroborates the fact of pregnancy. It is therefore my finding and conclusion that penetration was satisfactorily proved by the Prosecution. 11. On identification, the Court of Appeal in *Mwaura v Republic* [1987] KECA 62 (KLR) established the principles for visual identification, including

consideration of the length of time the witness had for seeing the accused, the position from which the witness saw the accused and the quality of light. However, this case was not one of visual identification but of recognition. TW, her mother PW2 and the Appellant himself in his defence all confirmed they knew each other well, having been neighbours in the same plot for a period of time. TW referred to the Appellant as her boyfriend, which removes any possibility of mistaken identity. The Appellant stated that another man, "Mwendwa," could be the father of the child and thus the perpetrator. While TW admitted to having had sex with another man named Mwendwa, this does not negate the fact that she also had sex with the Appellant on the specific date in question. The pregnancy itself does not have to be solely attributable to the Appellant for him to be guilty of the act of defilement. The act of penetration, with a child, is what constitutes the offence. I find that the trial court correctly convicted him for the specific act on 11 th October 2024. 12. The trial court's findings and my analysis of the record above lead me to conclude that the Appellant's conviction was safe and that his appeal on this aspect fails. I now turn to the issue of his sentence where as stated in the introductory part, the trial court sentenced the Appellant to 15 years imprisonment. I am in agreement with the trial court and the Prosecution that the sentence of 15 years imprisonment is the legal minimum prescribed by section 8(4) of the Sexual Offences Act . The Supreme Court has settled this issue in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) by stating that the mandatory minimum sentences in the Sexual Offences Act are constitutional and lawful, that they are minimum sentences setting a floor and that the trial court retains discretion to impose a harsher sentence but cannot go below the prescribed minimum. 13. I find that the learned trial magistrate correctly applied this binding precedent and while the Appellant pleaded for leniency, citing his elderly mother and dependents, the trial court had no legal discretion to impose a lesser sentence. The sentence was properly calculated to run from 14 th October 2024, the date of his first appearance in court, as required by section 333(2) of the Criminal Procedure Code which obligates the trial court to take into account the time already served in custody. Conclusion and Disposition 14. For the reasons set out above, I find that the Appellant's appeal lacks merit and it is hereby dismissed. DATED SIGNED AND DELIVERED VIRTUALLY THIS 10 TH DAY OF SEPTEMBER 2026 J W W MONGARE JUDGE In the presence of; Applicant present at Machakos Main Prison Ms. Machuma for the Respondent/ODPP Abdisalan- Court Assistant

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