



**MMS v Republic (Criminal Appeal E073 of 2023)  
[2025] KEHC 7216 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 7216 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E073 OF 2023  
A. ONG'INJO, J  
FEBRUARY 6, 2025**

**BETWEEN**

**MMS ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment of Hon. J.O Alambo Resident Magistrate and delivered on 1st November 2018 in Rongo CR. Case No. E30 of 2017, Republic Vs Magige Mwita Sagonyi)*

**JUDGMENT**

**Background**

1. The Appellant was convicted and sentenced to serve 20 years in prison for the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*.
2. The particulars of the offence were that the Appellant on the 13<sup>th</sup> day of November 2017 at [Particulars withheld] Village Kuria West Sub County within Migori County intentionally defiled E.W.M a child aged 13 years
3. The Appellant was aggrieved by the conviction and sentence and he preferred the appeal herein vide Petition of Appeal dated 23<sup>rd</sup> October 2023 on the following grounds:
  - a. That , the trial court erred in law and fact in not making a finding that the child did not describe the act that caused penetration beyond reasonable doubt.
  - b. That , the trial court erred in law in not making a finding that the age assessment report did not explain in court on how he assessed the complainant's age.
  - c. That , the trial court erred in law and in fact in not making a finding that penetration and particularly by the Appellant was not proved beyond reasonable doubt.



- d. That , the mandatory nature of minimum mandatory sentence under Section 8(3) of the SOA No.3 of 2006 is unconstitutional and not warranted on plea.
- e. That , the trial court erred in law and in fact in not making a finding that the Appellant ‘s sentence should run from time of his arrest pursuant to Section 333(2) of the CPC.
- 4 The Prosecution’s case was that the Complainant used to spend at her grandmother’s house or place 50 meters from her parent’s home. On the night of 13<sup>th</sup> of November 2018, the Appellant herein told her to wait for him so that he could take her to her grandmother’s place.
5. On the way before they reached the grandmother’s home, the Appellant held her hand and tols her “Piga nduru uone nitakukata na panga”.
6. That the Appellant dragged her into a maize plantation and put her doen and ordered her to remove her inner clothes. That when she resisted the Appellant told her, “Nitachukua kichino nikudunge nacho”. That the Appellant later went on to defile her and when she cried the Appellant warned her that he would beat her up. That while in the maize plantation they saw a torch light from the road and when she ran to the road she found that it was her mother who was looking for her and she reported to her that it was her father who had taken her to the maize plantation.
7. She said that she also reported to her uncle E that it was her father who had taken her to the maize plantation and raped her. That her uncle quarreled the Appellant asking whether what was said was true.PW1 said that they went to sleep and the following day her mother went to ask an elder on what to do and she was advised to take PW1 to the hospital.
8. PW1 said she was taken to Kehancha hospital. He did identify the treatment notes given at the hospital and she said thereafter they went to the Police Station and a P3 form was issued.
9. PW2, the Complainant’s mother SRM testified that on 13<sup>th</sup> November 2017 she was at home with her children when the Appellant who is her husband came in and found that they were taking tea and viazi. That then he said that he was going to his mother’s house and he urged the Complainant to eat quickly so that he could take her to the grandmother’s house.
10. That when the Appellant left with the Complainant he was armed with a panga and a kichino(chuma). That she waited for her husband to return so that she could close the door, but after two hours when he did not return she decided to go to her mother in law’s place to confirm if PW1 had gone to sleep. When she did not find the Complainant at her mother in laws place, her mother in law and E accompanied her to go and look for the child. She said they were using a torch and suddenly the Complainant emerged from the bush.
11. That when E asked PW1 where she had come from. She said that it was her father, the Appellant herein who took her to the maize plantation and raped her.
12. PW2 said that they slept at her mother in law’s place and that the Appellant went there the same night and said, “Mimi sikuwa hapa karibu sikuenda na mtoto.” PW2 said that the next day she went to Mzee wa Jamii and reported and she was advised to take the child to hospital as the child was walking slowly due to pain. They went to Kehancha hospital and later reported to Kenhancha Police Station.
13. PW2 said that they had not differed with the Appellant. She said that it was not the first time that the Appellant was raping the Complainant and that she went back to her maternal home because the Appellant’s people were protecting him.



14. PW3 the Clinical Officer Robi Wansu Abrahams Chacha examined the Complainant on 14<sup>th</sup> November 2017 following allegations of defilement. The Officer said that she observed the private parts of the Complainant, the Complainant's hymen was broken. That tests on high vaginal swab revealed spermatozoa and puss cells. As a result, it was concluded that the complainant was defiled by the father. PW3 produced the treatment notes and P3 forms.
15. PW4, Corporal John Naola testified that he took over investigation of the case from Mike Kiptum who had gone on transfer. He said that the Appellant was escorted to the Police Station by members of his family on allegation that he had defiled his own child and he was rearrested and placed in the cells.
16. The Appellant in his unsworn statement denied having committed the offence and said that on 13<sup>th</sup> November 2018 he woke up in the morning and his wife gave him porridge. The Appellant said that his wife looked moody and appeared like she wanted to go to a boda boda guy. That when the wife decided to go to the river he followed her and found she was talking to the boda boda guy. That when he waved at her she went to the river and the Appellant went to sell mtumba. That he told his friend that he was not going to help him to sell because of the rain and when he finished the work he went back home.
17. That he asked his wife no to go to the home of the boda boda guy. When he got home at 5:00 a.m in the morning he did not find his wife and Evalyne. That he asked his boys and his boys said he should eat in the morning but he refused. That one of his babies was hungry and he went to his mother and asked why his wife had not come home. That he went back home and cooked beans and sat home. At 11 a.m. the lover of his wife and another person came with is wife and assaulted him. That he was tied and beaten. That his mother saw him and she was very shocked. That he was taken to the Police Station on allegations she defiled Evalyne and he was shocked that his wife and Evalyne went to record a statement.
18. The Appellant said that he took EWM as a daughter although his wife came with her in 2003. The Appellant further said that his wife started having an affair with his brother/father because he is rich and has money. He said that he found her twice with the man.
19. The Appellant said that he could not have defiled the Complainant because his house to his mother's house is very near and that there was no noise that was raised. The Appellant said that his wife had sworn to teach him a lesson and that he has been fabricated as the story of Yusuf.
20. This Appeal was canvassed by way of written submissions.
21. In the Appellant's written submissions dated 9<sup>th</sup> of August 2024, he argued that the Complainant's age was not proved beyond reasonable doubt because the Complainant gave her age as 13 years before voir dire examination and as such that was evidence adduced in unsworn statement. He also said that an age assessment report was not produced to explain how the complainant's age was assessed.
22. On the issue of penetration, it was submitted by the Appellant that the Complainant did not describe the act that caused penetration as there were no bruises and the hymen was said to be broken a long time ago. He also argued that no DNA was done to link the spermatozoa found in the high vaginal swab to him and the trial Magistrate did not give reason why he relied on the Complainant's evidence.
23. The Appellant claimed that on the material day he was away from the scene and that the evidence adduced was fabricated by the wife and the Complainant after being influenced by the Appellants brother and the bodaboda rider who were having love affairs with his wife. He said that the presence of the spermatozoa was not conclusive proof of penetration.
24. On sentence the Appellant faulted the trial court for not making a finding that the minimum mandatory nature of sentence under the *Sexual Offences Act* is unconstitutional. In support of his position he cited the holding in *Maingi & 5 others v Director of Public Prosecutions & another* [2022]



KEHC 13118 (KLR) at Machakos and the Court of Appeal holding in Joshua Gichuki Mwangi Vs Republic [2022] KLR.

25. The Appellant also faulted the trial Magistrate for failing to make a finding that his sentence should start from the day of his arrest pursuant to Section 333(2) of the CPC. He said that he was in remand from 31<sup>st</sup> November 2017 to 1<sup>st</sup> November 2018 during which period he was in remand while undergoing trial.
31. The Appellant also argued that the trial Magistrate’s judgement was not signed or dated.
26. The Respondent’s on the other hand filed written submissions dated 19<sup>th</sup> November 2024 and submitted that all the ingredients of the offence of defilement namely penetration, age of the complainant and identity of the assailant were proved by the Prosecution beyond reasonable doubt.

### **Analysis and Determination**

27. In a first appeal, the duty of the court was stated in Mark Oiruri Mose vs. R (2013) eKLR thus;  

“.... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”
28. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are whether the ingredients of the offence of defilement were proved beyond reasonable doubt.
29. Section 8 (1) as read with 8(3) of the [Sexual Offences Act](#) provides:  

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.....  
  
.....  
  
(3) 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.”
30. The key ingredients of the offence of defilement are age of the victim, proof of penetration and identification of the assailant.
31. From the evidence of PW1 she said she was 13 years and a Standard 5 pupil at Bokiharaga Primary School. This was after she had undergone voir dire examination and the Court established that she was intelligent and could be sworn.
32. The Appellant did not cross-examine the Complainant as to her age. PW3 the Clinical Officer also said that when she interviewed the Complainant she said she was 13years and indicated that age in the P3 form and PRC form. She also produced age assessment report from Kuria District Hospital indicating that the Complainant was between 12 and 13 years. The Clinical Officer was also not questioned on how he found the Complainant was 13 years.
33. The Appellant having failed to challenge the Prosecution’s evidence as to the age of the Complainant at trial cannot raise it on appeal. In any case he has been living with the Complainant since he married her mother and he should be in a position to know her age.



34. The Court of Appeal in the case of Edwin Nyambogo Onsongo Vs Republic [2016] eKLR stated as follows on proof of age.
- “... 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.”
35. There is nothing in the evidence of PW1, PW2 and PW3 that would make this Court think that the Complainant was not aged 13 years as per the charge sheet.
36. On the issue of penetration, the Appellant claimed that the presence of spermatozoa alone is not conclusive proof that the Complainant has sexual intercourse. The Complainant’s evidence was that the Appellant insisted on escorting her to her grandmother’s place where she usually spent the night and while escorting her he was armed with a panga and kichino (chuma) that on the way he dragged her into the maize plantation and while threatening to cut her defiled her.
37. PW2 said that when the Appellant took over 2 hours before he could return, she followed to her mother in laws place which is 50 meters away but she did not find the Appellant or the Complainant. It was while they were searching for the Complainant that she emerged from the maize plantation and said it was the Appellant who had taken her there. PW2 was with her mother in law and her brother in law.
38. PW1 said that her uncle E quarreled with the Appellant over what he had done. When taken to the hospital and lab tests carried out it was found that the high vaginal swab had spermatozoa an indication that there was penetration. From the circumstances of the case there is no other inference that can be made other than the fact that there was penetration.
39. The Appellant denied having committed the offence and claimed in his unsworn statement that it is because his wife had an affair with his rich brother and a boda boda guy that PW1 and PW2 had been influenced to fabricate him.
40. PW1 said that it is the Appellant who had raped her and what she had said was the truth. PW2 in cross examination said that he had never mistreated the Appellant and that he had never sworn to teach him a lesson. The Appellant did not cross examine PW1 and PW2 in the allegation that he had made in his unsworn statement and the Prosecution could not have interrogated his evidence because he gave an unsworn statement. If it was true that the Appellant was fabricated, PW3 who is an independent witness could not have found that the Complainant was defiled. This Court therefore finds that the Appellant’s allegations are an afterthought and cannot challenge the Prosecution’s evidence that he was positively identified as the assailant.
41. On the issue of sentence mandatory nature of sentences under [Sexual Offences Act](#) being unconstitutional the Appellant relied on the Petition E017 of 2021 Maingi and 5 Others Vs DPP and Another and the Court of Appeal decision in Joshua Gichuki Mwangi Vs Republic 2022 eKLR
42. However, in the latter case the Supreme Court 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) overturned the Court of Appeal decision that mandatory minimum sentences in [Sexual Offences Act](#) are unconstitutional.



43. Upon convicting the Appellant, the trial Magistrate gave him an opportunity to mitigate and subsequently passed the sentence of 20 years. The Appellant who is indicated as the father of the Complainant could have been sentenced to more than 20 years' imprisonment but the trial Magistrate exercised discretion and gave him the minimum sentence. This Court cannot interfere with the lawful sentence passed by the trial Magistrate in exercise of discretion.
44. This appeal therefore lacks merit and is dismissed save that the Appellant's sentence of 20 years will run from 16<sup>th</sup> November 2017.

Right of Appeal 14 days.

**DaTED, SIGNED AND DELIVERED THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2025**

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**HON. JUSTICE A. ONGINJO**

**JUDGE**

In the presence of: -

