



**WMA v Republic (Criminal Appeal E007 of 2024)
[2025] KEHC 2054 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E007 OF 2024
AC BETT, J
FEBRUARY 11, 2025**

BETWEEN

WMA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence of Hon. V. O. Amboko (SRM)
in Kakamega CMCR. S.O. NO. E057 OF 2022 dated 5th December 2023)*

JUDGMENT

1. The Appellant WMA was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006 in which the particulars were that on the 28th day of January 2022, at (particulars withheld) within Kakamega County he unlawfully and intentionally caused his penis to penetrate the vagina of L. N. a child aged thirteen (13) years.
2. After a hearing in which the prosecution called seven witnesses, the Appellant was convicted of the offence and sentenced to serve an imprisonment of twenty (20) years.
3. Being aggrieved with the conviction and sentence, the Appellant lodged a Petition of Appeal in which he set out six grounds of appeal. The Appellant later filed a Supplementary Petition of Appeal setting out further grounds of appeal. The said grounds of appeal are set out as follows:-
 - i) That the learned trial Magistrate grossly erred in both law and facts by convicting in a case where the main ingredients of defilement were not proved beyond reasonable doubt.
 - ii) That the learned trial Magistrate grossly misdirected herself in law and facts by convicting me without considering that it has a judicial discretion to sentence me to a lesser sentence.



- iii) That the learned trial Magistrate grossly erred in both law and facts by convicting me while relying on evidence which was full of contradictions and fabrications.
 - iv) That the learned trial Magistrate grossly erred in both law and facts by imposing a harsh sentence on me without considering that the evidence was flimsy and inadequate to secure conviction.
 - v) That the learned trial Magistrate grossly erred in both law and facts by failing to consider that Article 50(c) of *the Constitution* was not met.
 - vi) That the learned trial Magistrate grossly erred in both law and facts in rejecting my defence without proper evaluation and shifting burden of proof to me.
4. The supplementary grounds of appeal are as follows:-
- i) That the trial court erred in law and in fact in weighing the prosecution witnesses' evidence PW1, PW2 and PW6 against the prosecution witnesses' evidence PW4 and PW5 and finally returning a conviction verdict on the defence (Appellant) by convicting me while relying on evidence which was full of contradictions and fabrications.
 - ii) That the trial court erred in law and in fact in not making a finding that there was no conclusive proof of penetration.
 - iii) That the trial court erred in law and in fact in meting out a manifestly excessive sentence are not clear.

Background

- 5. The prosecution's case was that on 28th January 2022 at 5.00 p.m. the victim LN who is a niece to the Appellant was at her grandmother's house. The Appellant arrived and told her to remove her panty then defiled her on her grandmother's bed. At the time of the incident, the Appellant had sent V, G, D and K to go and buy juice so he could remain alone with the victim. As the Appellant was defiling the victim the quartet that had been sent to buy juice arrived and on peeping through the window, witnessed the defilement going on.
- 6. After the defilement, the victim went to the village elder in company of the other four children where her brother Kelvin made a report. Later, the victim informed her grandmother of the defilement and in response, the grandmother told her she did not want her in her home anymore whereof one of her uncles took her away.
- 7. The victim was later taken to hospital where the examining clinician confirmed that she had been defiled.
- 8. The Appellant was arrested on 11th May 2022 as he had gone into hiding after committing the offence.
- 9. The court directed that the appeal be disposed of by way of written submissions.

Appellant's Submissions

- 10. The Appellant submits that there were material contradictions in the evidence of PW1, PW4 and PW5 and that the evidence of PW4 and PW5 being stronger because it was on oath pointed that the witnesses were bribed with soda and bread in order to frame the Appellant and thereafter they were coached to tell lies. The Appellant relies on the South African Case of S v Kelly 1980 (3) SA 301 and Ramkashma Denkerai Pandya v Republic [1957] EACA 102.



11. The Appellant further submits that the court ought to have not made a finding that there was penetration merely because of absence of a hymen which was not freshly torn and cited the case of John Mutua Munyoki v Republic [2017] eKLR and Arthur Mshila Menga v R [2016] eKLR.
12. The Appellant further submits that PW1's evidence was marred with inconsistencies, discrepancies and contradictions and points out the differences in the date when they reported to the village elder as given by PW1 and the date stated by the village elder.
13. Further, the Appellant contends that the trial court failed to point out the instances of demeanour of PW1 which caused the court to believe her testimony. The Appellant cited John Cordon Wayner v Republic & 2 others [2001] eKLR.
14. Finally, the Appellant submits that the sentence was manifestly excessive.

Respondent's Submissions

15. The Respondent on its part submits that the main ingredients of the offence of defilement were proved beyond reasonable doubt. On the issue of the identification of the perpetrator, the Respondent relies on the evidence of PW1 and cites the case of PMG v Republic [2022] eKLR in which the court made reference to the Court of Appeal case of Stephen Nguli Mulili v Republic [2014] eKLR.
16. The Respondent submits that the court properly invoked the provisions of Section 124 of the *Evidence Act*. In regard to the ground that the trial court erred in convicting the Appellant in the face of contradictions and fabrications in the evidence, the Respondent submits that the court noted that the evidence of PW1 was cogent and consistent and the evidence that would be said to be contradictory and fabricated is the evidence of PW4 and PW5 and the court was not bound to rely on their evidence upon invoking Section 124 of the *Evidence Act*. The Respondent relies on the case of AHM v. Republic [2022] KEHC 12773 (KLR).
17. In regard to the claim that Article 50 (2) (c) of *the Constitution* was violated the Respondent submits that the Appellant has not explained how the said right was violated.
18. On the sentence, it is submitted that the sentence is the prescribed mandatory minimum sentence under the *Sexual Offences Act* and is therefore proper.
19. Finally, the Respondent submits that the trial court considered the Appellant's defence and rightfully rejected it. Being an unsworn statement against the evidence tendered, it is submitted that it was a mere denial lacking probative value and did not shake the prosecution's case.

Analysis And Determination

20. Being the first appellate court, the duty of this court is as laid out in Okeno v. Republic 1972 EA 32.
21. The issues for determination that emanate from the appeal and the parties' submissions are as follows:-
 - (a) Whether the Appellant's rights under Article 50 (2) (c) of *the Constitution* were violated.
 - (b) Whether the main ingredients of defilement were proved beyond reasonable doubt.
 - (c) Whether the evidence was full of contradictions and fabrications.
 - (d) Whether the trial court did not consider the Appellant's defence.
 - (e) Whether the sentence was proper.



22. Article 50 (2) (c) of *the Constitution* provides as follows:-

“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.”

23. The Appellant has not expressly stated how he was not provided with adequate time and facilities to prepare a defence. He took plea on 13th May 2022. Proceedings were taken in Kiswahili language which he said he could understand. The first witness testified on 27th April 2023. The Appellant was able to cross-examine the witnesses and challenge their evidence. At no point did he apply for adjournment or indicate to the court that he needed time or any documents to facilitate his defence. When he was placed on his defence, he said that he was ready to proceed with an unsworn statement and he had no witness to call. He then proceeded to give a statement in denial.

24. In the absence of specific particulars with respect to the alleged violation of the Appellant’s constitutional rights, this court finds that this ground must fail on the ground that at no point during the proceedings did the Appellant complain of the alleged violation. In the case of *Domenic Kariuki v Republic* [2018] eKLR, the court held as follows:-

“10. While I so associate myself, it must be noted that rights go hand in hand with responsibilities. Nowhere in the court record is it revealed that the appellant asked for provisions of the documents and was denied. It is unclear why the appellant did not raise the issue at the earliest instance...”

i. Whether the main ingredients of defilement were proved beyond reasonable doubt

25. Section 8(1) of the *Sexual Offences Act* states:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

26. Section 8 (3) of the *Sexual Offences Act* provides:-

“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.”

27. In the premises, the elements that have to be proved to sustain a conviction in a defilement case are:-

- (i) That there was an act of penetration.
- (ii) The age of the minor.
- (iii) The identity of the Accused.

In the case of *Gacheru v. Republic* [2023] KEHC 3005 (KLR) the court reiterated the position and stated as follows:-

“The ingredients for the offence of defilement are identification on recognition of the offender, penetration and the age of the victim.”

28. On the age of the victim, the Complainant, after a *voire dire* examination in which the court concluded that she was possessed of sufficient intelligence to give evidence and understood the meaning of the



oath, gave a sworn statement. She testified that she used to be a student at Mungulu Primary School and was in Class six in the year 2022. Although she did not expressly state her age, she identified her birth certificate.

29. The victim's birth certificate, which was produced by the investigating officer, indicates that the victim was born on 24th July 2008. The birth certificate was registered and issued on 6th August 2020. In further support of the victim's age, a letter dated 31st January 2022 confirming the victim's age to be 13 years was identified by PW3 and produced by the Investigating Officer. PW is a maternal uncle who rescued the child after she had been threatened by her grandmother and the Appellant.

30. Rule 4 of the Sexual Offences Rules sets down the parameters that may be used in arriving at a decision as to the age of a complainant and states as follows:-

“When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”

31. In the case of *Edwin Nyambogo Onsango v Republic* [2016] eKLR, the Court of Appeal held that:-

“...the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary 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” It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See *Denis Kinywa -vs- Republic Criminal Appeal No. 19 of 2014*) and (*Omar Ucher v Republic Criminal Appeal No. 11 of 2015*). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in *Francis Omuroni v Uganda Criminal Appeal No. 2 of 2000*.

“We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable...”

32. In the premises, there is no doubt whatsoever that the State was able to prove the victim's age to the required standard.

33. In regard to the question of penetration, Section 2 of the *Sexual Offences Act* defines penetration as:-

“The partial or complete insertion of the genital organs of a person into the genital organs of another person.”

34. The P3 form confirmed the absence of the hymen and the presence of epithelial cells in the victim's vagina. The medical practitioner who examined the victim confirmed that there was defilement.



35. The presence of epithelial cells has been held to be an indication of recent trauma to the vaginal wall that proves an act of penetration. In *Philip Ochieng Owino v. Republic* [2019] eKLR, the Court had this to say:-
- “Medical evidence confirmed that the hymen was not freshly broken but the presence of epithelial cells which the clinical officer stated was evidence of friction on the vaginal wall corroborated the complainant’s evidence that she had been repeatedly defiled.”
36. The presence of epithelial cells as proof of penetration was also reiterated in the case of *Gilbert Cheruiyot Yegon v Republic* [2019] eKLR.
37. Although the absence of a hymen has been held to be inconclusive in proving penetration, the presence of epithelial cells that are caused by friction or trauma to the vaginal walls has been an irrefutable proof of penetration. I am therefore satisfied that the prosecution proved the element of penetration beyond reasonable doubt.
38. The final ingredient in a defilement case is identification. To sustain a conviction, the element of identification of the perpetrator must be treated with caution especially where the conviction is reliant on visual identification by a sole victim.
39. In the case of *Francis Kariuki Njiru & 7 others v. Republic* [2001] eKLR, the Court of Appeal held thus:-
- “The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.”
40. In my view, visual identification by way of recognition is the best form of identification. Once a victim establishes that she was familiar with the assailant, the issue of identification should be settled. In the case of *Peter Musau Mwanzia v. Republic* [2008] eKLR, the Court of Appeal held as follows:-
- “We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.”
41. The prosecution’s case was that the Appellant was well known to the victim. He was her paternal uncle. They lived together in the same homestead. The offence occurred during the day. The Appellant was therefore identified by recognition.
42. Under Section 124 of the *Evidence Act*, the court can convict an accused in a sexual offence based on the sole evidence of the victim provided it is satisfied that the victim is telling the truth. In the case



of PMG v. Republic [2022] eKLR, the court made reference to the Court of Appeal case of Stephen Nguli Mulili v. Republic [2014] eKLR and stated thus:-

“40. There is no dispute that under Section 124 of the *evidence Act*, a court can convict based on the evidence of the victim alone in sexual offences. In this regard am guided by the case of Stephen Nguli Mulili v Republic (supra) where the court held;

“with regard to the issues of corroboration and the appellant being proved as the one who defiled the complainant, section 124 of the Act is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the trial court was satisfied that the victim told the truth.”

43. I have reviewed the evidence tendered by the prosecution. The victim testified that her siblings and cousins, namely V, G, D, and K peeped through the window and saw the Appellant on top of her and later, they accompanied her to the village elder to lodge the report. The village elder corroborated the victim’s evidence. However, PW7 who was the Investigating Officer testified that she had tried to bond the minors to attend court and give evidence but she received information that they had been threatened.

44. This court is of the view that notwithstanding the failure of the minor witnesses who saw the Appellant committing the offence to attend and testify, the trial court made a proper analysis and rightly invoked the provisions of Section 124 of the *Evidence Act*. The court had the opportunity to observe the victim as she testified and was convinced that she was being truthful. In the circumstances, I find that the issue of identification of the Appellant as the perpetrator was fool proof.

45. The Appellant has argued that the trial court relied on evidence which was full of contradictions and fabrications. In the case of AHM v. Republic [2022] KEHC 12773 (KLR), the court held as follows:-

“The court’s duty is to determine whether there were contradictions in the evidence tendered, and if so, whether the contradictions (if any), are so material that the trial Magistrate ought to have rejected the evidence. As was held by Ugandan Court of Appeal in Twehangane Alfred v Uganda, it is not every contradiction that warrants rejection of evidence. The court stated: -

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

46. I have carefully considered the evidence on record. I am obligated to interrogate the contradictions and the alleged fabrications and determine whether they are so material as to affect the conviction. In the case of Gidraph Maina v. Republic [2024] KEHC 2948 (KLR), the court cited the Court of Appeal in Dickson Nsamba Shapwata & Another v. Republic Cr. App. No. 92 of 2007 in which it held:-

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”



47. The evidence of the victim was cogent and consistent. She did not waver during cross-examination. The evidence that was contradictory was that of PW4 and PW5. PW4 who said he was 17 years old denied being present when the incident occurred. Contrary to what the victim had testified, he said that he did not witness the incident but was informed by his sisters V, G and D. According to him, V, G, and D told him that the village elder had bought them soda and told them to lie.
48. PW5 was 10 years old and after voir dire examination, gave a sworn statement. She pleaded ignorance of the incident and said that the village elder has told them to lie that the Appellant raped the Complainant. She said that the Appellant was her uncle.
49. It is against the backdrop of the testimonies of PW4 and PW5's contradictory evidence that the Appellant invites the court to find that the trial court relied on contradictory and fabricated evidence to convict him.
50. I have carefully considered the said evidence. It is not lost to me that the victim and the two witnesses are related to the Appellant, who is said to be their uncle by virtue of being their father's brother. I have also considered the fact that the victim testified that when she informed her paternal grandmother about the incident, the said grandmother castigated her saying she was lying and she and the Appellant told her that she was no longer wanted in the home. At the time of the case, the victim was no longer living in her paternal home. The possibility that there was undue influence on PW4 and PW5 in view of their relationship with the Appellant cannot be wished away. Consequently, I am of the view that the contradictions in the evidence of the complainant and the said two witnesses was not the result of fabrications but the result of intimidation, threats or undue influence and therefore insufficient to affect the final outcome of the case.
51. Additionally, the evidence by the victim that she was defiled was corroborated by the P3 form that was produced by PW6. According to PW6, the victim was examined on 31st January 2022. The PRC form indicates the presence of numerous epithelial cells which is a result of trauma or friction to the vagina. This was sufficient corroboration of the act of penetration. In the case of *Gidraph Maina v. Republic* (supra), the court cited the case of *Bassita Hussein v. Uganda*, Supreme Court Criminal Appeal No. 35 of 1995 in which the Supreme Court of Uganda held as follows:-
- “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by medical evidence or other evidence.”
52. In regard to the ground that the trial court failed to consider the defence by the Appellant, the Appellant gave an unsworn statement. He did not call any witness. He made a mere denial in which he denied committing the offence on the basis of his age. His defence placed him at home on the date of the incident.
53. In choosing to give an unsworn statement, the Appellant denied the court the opportunity to have his evidence tested by way of cross examination. His evidence did not hold any probative value or evidential value. In the case of *KOO v. Republic* [2020] eKLR, the court stated as follows:-
- “66. In his defence, the appellant gave an unsworn statement. That is his right in law. That evidence could not be tested in cross examination. As earlier stated, the law relating to unsworn statements is well expressed by Emukule, J in the case of *Mercy Kajuju* (supra) where he stated as follows:



“I also discussed at some length the nature and value of unsworn statement, and on authorities held that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence.”

54. The Appellant’s defence was properly considered and dismissed by the trial court. The court held that the unsworn statement did not create any doubt in the court’s mind. The Appellant did not displace the prosecution’s case. The court had the opportunity of hearing and seeing all the witnesses as they testified and made its finding of facts based on the said observation. Having reviewed the evidence in totality, I find that the trial court considered the Appellant’s defence and rightly rejected it.
55. From my re-evaluation of the entire evidence, I find that the offence of defilement of a minor was proved and the conviction safe.
56. The Appellant has also faulted the trial court on the sentence. His position is that the same was manifestly excessive.
57. It was proven that the victim was aged 13 years at the time of the offence. Section 8 (3) of the [Sexual Offences Act](#) prescribes a minimum sentence of 20 years for the offence of defilement of a child aged between 12 and 15 years. The sentence of twenty (20) years imposed upon the Appellant was proper. In the case of Republic v. Joshua Gichuki Mwangi, Petition No. E018 of 2023 [2024] KESC 34 (KLR), the Supreme Court pronounced itself on the issue of minimum sentence provided under the [Sexual Offences Act](#) when it held as follows:-

“ 57. 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.”

The court further stated:-

“However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act.”

58. Based on the foregoing, it is clear that where a minimum sentence is prescribed, the trial court has discretion to impose a higher sentence but not a sentence lower than the minimum sentence. In this case, the trial court exercised its discretion and sentenced the Appellant to the minimum sentence. I do not find fault with it as the trial court considered all the circumstances.
59. This court is bound by the decision of the Highest Court of the land. Until the legislation is amended, or until the Supreme Court pronounces otherwise, the doctrine of stare decisis applies to this court. My hands are therefore tied.
60. In the end, I find that the appeal lacks merit in its entirety. The appeal is therefore dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 11TH DAY OF FEBRUARY 2025.



A. C. BETT

JUDGE

In the presence of:

The Appellant

Ms. Chala Respondent/State

Court Assistant: Polycap

