



REPUBLIC OF KENYA



**GNM v Republic (Criminal Appeal E061 of 2023)
[2025] KEHC 5578 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E061 OF 2023**

EN MAINA, J

APRIL 24, 2025

BETWEEN

GNM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgement of Hon. A.Nyoike – SPM
Machakos dated and delivered on the 11th day of October 2023 in the
Machakos Chief Magistrate’s Court Sexual Offence No. E037 of 2021)*

JUDGMENT

1. The Appellant was charged with the offence Defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* and in the alternative committing an indecent act with a child Contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the main charge were that on 3rd June 2020 at night in Kathiani Sub County within Machakos County, the Appellant intentionally and unlawfully caused his penis to penetrate the anus of AKM, a child aged fifteen years. The particulars of the alternative charge were that on the same date and place he intentionally touched the anus of AKM with his penis.
2. The Appellant pleaded not guilty to the charges and the prosecution embarked on a trial to prove its case.
3. At the trial six (6) witnesses testified against the accused and on 11th May, 2023 the court made a finding that he had a case to answer whereupon he testified on oath and contended that the child was well known to him and they never had issues save for the night he (the child) stole from him.
4. Upon evaluating the evidence by both sides, the trial Magistrate found the Appellant guilty on the main charge, convicted him and sentenced him to a term of imprisonment for twenty (20) years.



5. Being aggrieved by the entire judgment, conviction and sentence, he now appeals on grounds that;
 - “ a. The learned Trial Magistrate erred in both fact and law by convicting him on evidence that did not meet the minimum threshold to uphold a conviction.
 - a. The learned Trial Magistrate erred in both fact and law by not considering his sworn defense.
 - b. The learned Trial Magistrate erred in law by sentencing him by virtue of the minimum mandatory sentences stipulated in the *Sexual offences Act.*”
6. The appeal was canvassed by way of written submissions. Those of the Appellant are dated 22nd January, 2025 and raise three issues; firstly that the ingredients for the offence of defilement were not proved; that the PRC form was filled a year after the alleged incident on 28th June, 2021 hence the findings therein are questionable and that the accusation of defilement is an afterthought to fix him. To support his submissions the Appellant relied on the case of Daniel Kiplimo Cherono vs Republic [2014] eKLR and the case of Bassita Hussein vs Uganda, Supreme Court Criminal Appeal no 35 of 1995.(citation not supplied).
7. Secondly, the Appellant submitted that the learned magistrate did not consider his defence and lastly, he urges this court to consider the sentence as Odunga J did in Petition 17 of 2021, Philip Mueke & Other vs Republic where he declared the minimum sentences under the *Sexual Offences Act* unconstitutional. The Appellant faulted the Supreme Court’s decision in the case of Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition 18 of 2023) [2024] KESC 34 (KLR) 12th July 2024) (Judgment). He placed reliance on the cases of Akumu vs Republic (1954) 21 EACA, Elizabeth Waithiengi Gatimu vs Republic (2015) eKLR and Sekitoliko vs Uganda (1967) EA 53.
8. The appeal is vehemently opposed through the prosecution Counsel’s submissions dated 25th November,2024 wherein Learned Prosecution Counsel contends that the evidence in the trial court met the threshold to uphold a conviction for the offence of defilement. That the evidence of Pw.1 and Pw.3 proved that the complainant was sodomised, that the age of the complainant was proved through a birth certificate that indicates he was born on 21st October, 2004 and that the Appellant was positively identified as the perpetrator.
9. Learned Prosecution Counsel submitted that the prosecution’s evidence was cogent and was not uncontroverted by the sworn evidence of the Appellant who did not call any witness. As for the sentence, Counsel submitted that the same was within the law. Counsel placed reliance on the cases of FOD vs Republic (2014) eKLR, George Opondo Olunga vs Republic [2016] eKLR, Peter Musau Mwanzia vs Republic [2008] eKLR and Patrick Kathurima vs Republic [2015] eKLR and Samuel Warui Karimi vs Republic [2016] eKLR.

Analysis and determination.

10. As the first appellate court, I have reconsidered and evaluated the evidence adduced before the trial court so as to arrive at my own independent conclusion albeit bearing in mind that I did not see or hear the witnesses and made provision for that – (see Okeno v Republic [1972] EA 32).



11. The Appellant was charged under Section 8 (1) and (3) of the *Sexual Offences Act* which provide as follows:
 - “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2)
 - (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”
12. The ingredients of the offence of defilement are therefore:-
 - a. Proof that the complainant is a child (and the age of that child for purposes of sentencing).
 - b. Penetration.
 - c. Identification of the Appellant as the perpetrator.
13. The evidence of a victim of the offence of defilement does not require corroboration and the court may convict solely on the evidence of the victim if for reasons to be recorded it is satisfied the victim is telling the truth (see the proviso to Section 124 of the *Evidence Act*).
14. A birth certificate dated 7th July, 2021 was produced in evidence. The same indicates that the complainant was born on 21st October, 2004 meaning that at the time of commission of the offence, he was 15 years and 8 months old. Section 83 of the *Evidence Act* requires this court to consider that certificate as genuine hence prima facie proof the age of the complainant was proved beyond reasonable doubt. He was a child for the purposes of the *Sexual Offences Act* and hence incapable of consenting to sexual acts.
15. 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. Genital organs are defined by the same section to include the anus.
16. The Complainant testified that on the material day at about 8 p.m. the Appellant went to their house for a memory card which he had had gifted to him for some work done. The work included washing his (Appellants) clothes on various occasions. The court heard that the Appellant found the complainant with his mother and sister. When he demanded for the memory card the complainant was hesitant and it was then that the Appellant requested him to follow him to his (Appellant’s) house. The Complainant obliged thinking that all was going to be well as he had occasionally spent nights at the Appellant’s home. He stated that upon arrival at the house the Appellant hit him on the back of the head with a piece of wood and although he tried to defend himself but he was overpowered. After beating him all over the body the Appellant tied him to the bed with a piece of rubber before going for his brother MM. He continued beating him even in the presence of MM. His (complainant’s) plea for help fell on deaf ears. He stated that the Appellant questioned him about a bucket and some Kshs.24,000/- which he denied any knowledge of. His responses were all the while being recorded by Mutisya. After beating him, the Appellant frogmarched him to the house of his parents where he was forced to partake of food and water. It was after that that the Appellant took him back to his (Appellant’s) house where in the middle of the night he sodomised him. The complainant testified that although he was taken to hospital for the injuries he had sustained as a result of the assault he did not disclose that he had been sodomised. He confided in his mother much later. He also disclosed



- that fact to his school Principal as he was unable to sit down for long and needed permission to seek medical attention now and then. His mother PW.2 testified that when she saw the complainant the day after he had gone with the Appellant, she observed that he had injuries. She reported the matter to the Chairman of Nyumba Kumi and the complainant was taken to hospital but after he went back to school the principal called her to take him to hospital. She confirmed that the complainant had not told her that he had been sodomised.
17. RMM the Appellant's brother PW3, testified that he witnessed the complainant tied to a bed in the Appellant's house and being questioned about some money and a memory card. He however did not hear about the defilement until much later. He testified that on that material day the complainant had been visibly assaulted.
 18. The Principal of the complainant's school (PW.4) confirmed that when the complainant went back to school, she observed he was having difficulty in walking and called his mother and advised her to take him to a hospital with better facilities than the one he had been frequently asking for permission to go to. She also confirmed that the complainant confided to her that on 3rd June 2020 he had been sodomised by his uncle M.
 19. PW.5, a clinical officer at Kathiani Level 4 Hospital remembered examining the complainant at the hospital on 28th June, 2021. She testified that she observed that there were lacerations/wounds on his anus. She produced a P3 form and a PRC form in evidence.
 20. In his defence the Appellant stated that on the material day the complainant had stolen a memory card from his house. He stated that he went to the complainant's home and found him. He had the memory card in his pocket. He stated that the two of them went to his house at 2000 hours and that the complainant admitted he had stolen the memory card. He contended that the charges against him were fabricated.
 21. I have evaluated the evidence and submissions by both sides carefully. I find it a fact from the evidence that the complainant was sodomised. Although he did not disclose it to anyone immediately there is evidence which proves beyond reasonable doubt that the offence of sodomy was perpetrated against him. His mother (PW2) testified that she noted that apart from the physical injuries on his body, he was walking with difficulty. He did not however disclose to her that he had been sodomised. It was to his School Principal (PW4) that he first disclosed his ordeal. This was after she inquired why he kept asking for permission to go to hospital and whereas a year had passed, PW5, the Clinical officer who examined him at Kathiani Hospital on 28th June 2021, saw wounds in his anus thus corroborating what he had told his school Principal and mother. I am satisfied therefore that there was evidence beyond reasonable doubt that he was defiled.
 22. As for the identity of the perpetrator I am satisfied that it was proved beyond reasonable doubt that it was the Appellant. The Appellant's brother PW3 confirmed that he found the complainant in the Appellant's house and that the complainant had been visibly assaulted. It is my finding that the evidence of PW3 lends corroboration to that of the complainant albeit that it was only to the extent that the Appellant had the complainant in his house on that day. The Appellant's own testimony corroborated that of the complainant to a large extent.
 23. I am therefore satisfied that the complainant was a truthful and reliable witness. He knew the Appellant very well, and that fact was corroborated by PW2 and PW3. There is nothing in the evidence to suggest that the complainant had any ulterior motive to fabricate evidence against the Appellant or to frame him. I find therefore that the offence for which the Appellant was convicted was proved against him beyond reasonable doubt.



24. As regards the sentence, the section under which the Appellant was charged prescribes a sentence of “not less than twenty years.” The Trial Court sentenced the Appellant to imprisonment for twenty years which is the minimum sentence under the law. The Supreme Court decision in the case of Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition 18 of 2023) [2024] KESC 34 (KLR) 12th July 2024 (Judgment) alluded to by the complainant, is binding on this court. I therefore find no reason to interfere with the sentence and as I also note that the trial court also considered the time the Appellant spent in remand custody as is mandatory under Section 333(2) of the *Criminal Procedure Code*. The appeal on sentence is therefore without merit.
25. In the end, the Appeal is found to be without merit and is dismissed in its entirety and the conviction is upheld and the sentence affirmed.

It is so ordered

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF APRIL, 2025.

E. N. MAINA

JUDGE

In the presence of:

The Appellant

Ms Nyauncho for the state

Appellant online from Machakos Main

Geoffrey – Court Assistant

