



**Njeri v Republic (Criminal Appeal E008 of 2024)
[2025] KEHC 4656 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E008 OF 2024**

JN ONYIEGO, J

APRIL 8, 2025

BETWEEN

JOSEPH MURIITHI NJERI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence in Wajir PMCC
No. E012 of 2024 delivered on 13.02.2024 by Hon. R. Aganyo (PM))*

JUDGMENT

1. 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* No. 3 of 2006. The particulars of the charge were that on diverse dates between July 2020 and 09th August, 2023 at unknown location within the republic of Kenya he intentionally caused his penis to penetrate into the anus of JM, a child aged 15 years.
2. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 09.08.2023 at [particular withheld] Wajir Township, within Wajir County he intentionally touched the anus of JM, a child aged 15 years with his penis.
3. He pleaded not guilty to the charge and a full hearing was conducted. The prosecution called four (4) witnesses in support of its case while the appellant gave a sworn testimony without calling any witness.
4. At the close of the prosecution's case, the trial court ruled that a prima facie case had been established against the appellant thereby placing him on his defence.
5. The trial court found him guilty and subsequently convicted him. He was consequently sentenced to 60 years in jail.



6. Being aggrieved by the determination of the trial court, the appellant, through his Advocates M/S Stephen Wanyoike & Co Advocates filed an amended petition of appeal on 21.11.2014. In summary, the following grounds were cited.
 - i. That the learned magistrate erred in law and facts by convicting him notwithstanding the fact that the prosecution did not prove its case.
 - ii. The learned magistrate did not provide the appellant an opportunity for a fair hearing,
 - iii. That the learned magistrate did not provide the appellant with the opportunity to call witnesses and in particular the court denied him an opportunity to call four witnesses to his defence.
 - iv. That the sentence meted out was harsh and excessive having regard to the circumstances of the case.
7. The court directed that the appeal be canvassed by way of written submissions.
8. The appellant via submissions dated 06.01.2025 urged that the evidence before the trial court was purely circumstantial as there was no real evidence to substantiate the claims by the complainant. That the evidence by the prosecution did not prove the elements of the offence herein and therefore, the burden of proof was not shifted. It was urged that there existed variance in the evidence adduced by the complainant and the medical officer as it was not proven that the tests were current.
9. It was contended that failure by the prosecution to present crucial witnesses in the case cannot be wished away. To that end, the appellant drew support from the case of Nganga vs Republic [1981] KLR where the court stated that where the prosecution fails to call material witnesses, they fail to do so at their own risk. That from the foregoing, no justification was provided as to why the prosecution failed to call the crucial witnesses. Additionally, that the investigating officer failed to conduct an independent investigations and/ or that, no investigations were carried at all. That the investigating officer simply regurgitated the evidence of the complainant without adding any value to the case before the court.
10. On sentencing, the appellant faulted the trial magistrate for meting a sentence which was not commensurate to the offence allegedly committed. In buttressing the fact that the sentence by the trial court was harsh, the appellant relied on the case of Francis Matonda Ogeto vs Republic [2019] eKLR where the court was of the view that noting that there exist minimum and maximum sentences, a court when meting out a sentence ought to give reasons and in the absence of not doing so, the sentence is to be considered as arbitrarily meted out.
11. That the sentence of 60 years was neither minimum nor maximum and therefore, this court ought to interfere with the same. In the end, the appellant urged this court to quash the conviction and set aside the sentence by the trial court and set free the appellant.
12. The respondent filed submissions dated 16.10.2024 thus urging that in a case like this, it is imperative that the prosecution proves the following: age of the victim, penetration and the identity of the perpetrator. That in this case, the complainant in his evidence stated that he was 15 years old and further to that, produced a birth certificate to corroborate the same. To that end, the learned prosecutor relied on the case of Fappyton Mutuku Ngui vs Republic [2012] eKLR where the court held that proof of age is not only cast on a birth certificate but any other formal document that may be used instead to prove age.



13. On penetration, counsel contended that the complainant reiterated how the appellant sexually abused him and the same was supported by the evidence of the medical officer. Lastly, on the identity, counsel urged that it was not denied that the appellant and the complainant were people who were known to each other. This court was therefore urged to dismiss the appeal and uphold the finding of the trial court.
14. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh and come to my own conclusions. This was set out by the Court of Appeal in *Kiilu & Another vs Republic* (2005)1 KLR 174.
15. Briefly, PW1 Thomas Nyagaka on behalf of Kalya testified that the complainant was presented with a history of defilement by a person known to him. That the complainant was aged 15 years and prior to being presented at the hospital, he had already taken a bath and also gone for a long call. On general examination, he stated that the complainant was in a fair general condition and upon carrying out anal examination, a fresh laceration on the anal region at the 2 O'clock and 1200 O'clock positions was noted.
16. That other systematic examination was normal. Besides, an anal swab was taken to the lab for analysis, blood tests were also done for syphilis, HIV test and consequently, the complainant was to go for counselling services. He further testified that the complainant was defiled last on the previous day at around 4.00 p.m, before reporting the matter and consequently being presented at the hospital. There was also an old healed scar at the back of the minor. The witness thus produced the treatment notes, the Lab request forms, the P3 Form and the PRC form as exhibits.
17. PW2, J.M.M., testified that he was aged 15 years and further produced his birth certificate noting that he was born on 01.11.2007. That the appellant was a person well known to him as he was not only his teacher but also his guardian. He narrated how the appellant as his guardian after taking him in, turned against him by repeatedly sexually abusing him. That the appellant had threatened him of dire consequences should he inform anyone of the abuses.
18. He narrated how the appellant used to tie him with ropes on the bed before penetrating him and that the same abuses happened for so long. In the same breadth, the appellant could force him to sell eggs till late in the night before coming back to the repeated sexual abuses. That one day, as he returned a bicycle that he had previously taken from home, a woman saw the injuries and demanded to know the cause of the same.
19. The said woman thus informed his uncle who went to school where he decided to spill the beans and reveal how the appellant used to sexually abuse him. He stated that his averments were confirmed by the doctor who examined him that indeed, he was being defiled. He stated that he managed to identify the appellant to the police at the time of arrest.
20. PW3, John Bundi Mwaria, the head teacher at MCK Community school testified that the appellant had previously requested him to allow the complainant join the school urging that the complainant's parents were not capable of providing for him. That the minor was admitted to the said school and by second term, the complainant's performance was not encouraging. One day, he found him sleeping while other students were sitting their exams and so, he demanded to know from the complainant why he chose to sleep as his colleagues proceeded with their exams. The complainant thus narrated to his class teacher of the ordeal that he had been facing while living with the appellant thus prompting him to report the matter to the police. He stated that upon the arrest of the appellant, the complainant was taken to the hospital for examination and treatment.



21. PW4, No. 90800 PC Alex Shisanya, the investigating officer testified that on 09.08.2023, at around 8.00 p.m., he received a call from the DCIO Chief Inspector Kello whom they agreed to meet at a certain venue together with PC Roble and Cpl. Shem Ashe. That they met at Oasis and later, they were joined by two teachers from MCK Community school where PW3 and one, Mr. Mitambo briefed them of the incident herein.
22. They met the complainant who at that time was selling eggs and further, explained to them what the appellant had allegedly been doing to him and thereafter led them to where the appellant was selling eggs. They identified themselves and consequently arrested the appellant, booked him in the cell and then escorted the complainant to the hospital for examination and treatment. That he later also escorted the appellant to the hospital for examination as he handed over the complainant to the head teacher. He conducted investigations and equally recorded statements from witness and thereafter preferred the charge herein against the appellant.
23. The appellant in his sworn testimony denied perpetrating the offence. He averred that to the contrary, he had been a good Samaritan to the complainant noting that he took him in as his parents were not capable of providing for the complainant. He averred that he had been faithfully providing the complainant with his basic needs as the parents were not in a position to provide for him. That at no point did the complainant state that he was being assaulted.
24. On cross examination, he stated that he had known the complainant from the year 2021 while he was a teacher at Sufficient Academy and the complainant was a student. Thereafter, he left Sufficient Academy and moved to Kasailani school and consequently to a Community School in Wajir where, together with the complainant, they have been living. He urged the court to dismiss the charges against him and set him free.
25. I have gone through and considered the trial court's proceedings, the undated petition of appeal and the written submissions by the parties. In my view the following issues fall due for determination:
 - i. Whether the prosecution proved its case beyond reasonable doubt.
 - ii. Whether the appellant's defence placed doubt on the prosecution's case.
 - iii. Whether the sentence preferred against the appellant was just and fair.
26. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.
27. On age, the complainant testified that he was aged 15 years and further, produced his birth certificate. From the birth certificate, it is clear that the complainant was born on 01.11.2007 while the offence herein was allegedly committed on diverse dates between July 2020 and 09th August, 2023. It therefore follows that the complainant was a minor roughly aged 15 years and 8 months at the time of the occurrence herein.
28. On penetration, section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.
29. It is trite that penetration can be proved through the evidence of the victim as corroborated by medical evidence. It should however be noted that if the medical evidence is insufficient, a court can still convict



solely on the evidence of a victim provided it believes the testimony of the victim and record such reasons pursuant to Section 124 of the Evidence Act which provides;

“(Sec. 124.) Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

30. In the instant case, the complainant narrated to the court how the appellant regularly defiled him and thereafter threatened him with dire consequences should he divulge the same. In the same breadth, PW1, a medical officer testified that upon the complainant being examined, it was found a fresh laceration on the anal region at the 2 O'clock and 1200 O'clock positions. From the foregoing, it is clear that indeed, the complainant was penetrated and as such, I find that the element of penetration was well proven by the prosecution.
31. The key question is, who penetrated him? On identification, it was not admitted that the parties herein were not strangers to each other. This is so since the appellant did not deny knowledge of the complainant as he stated in his evidence that the complainant lived with him as a guardian. Additionally, that he used to provide him with his basic needs and therefore, this was a case of recognition.
32. Although nobody saw the appellant defile the victim, the law does recognize the fact that a court can safely convict based on the evidence of the victim alone as long as the court is satisfied that the victim is truthful. Corroboration in sexual offences is thus not mandatory pursuant to Section 124 of the Evidence. See Mohamed Vs Republic (2006) 2 KLR 138, this Court asserted:

“It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”
33. The trial court was fully aware of the provision under section 124 of the Evidence Act and was satisfied that the child was truthful. There was no evidence to suggest that pw1 fabricated this case against his good Samaritan. I am equally persuaded by the evidence of complainant which is consistent. To that extent, am satisfied that the appellant was responsible in sexually assaulting the complainant.
34. The appellant urged that his defence was not considered by the trial court. However, a look at page 26 of the judgment, the trial court clearly dismissed the defence as a sham as it did not challenge the otherwise well corroborated prosecution's case.
35. Regarding failure to call crucial witnesses, there is no maximum number of witnesses required to testify. The prosecution has a duty to call witnesses it desires to prove its case.
36. The next issue is whether the sentence meted out was harsh. Under Sexual Offences Act, sentence for defilement is prescribed based on the age of the victim of the sexual assault. Although the Act does not expressly state the manner the penalty is prescribed, the implication drawn from the same is that the younger the victim, the more severe the sentence. Therefore, it appears to me that age of the victim



of sexual offence is an aggravating factor which the court should always consider amongst others in sentencing.

37. Having regard to the sentence meted out by the trial court and as already determined elsewhere in this judgment, the complainant was a minor roughly aged 16 years of age at the time the offence was perpetrated.
38. From the information above, my humble arithmetic points out to the fact that the complainant was aged 15 years, 8 months thus, the appropriate penalty clause in my view should be Section 8(4) of the Act which provides that 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.
39. The appellant decried the fact that the trial court meted out a sentence not known in the legal world as the same was neither minimum nor maximum. That the sentence meted out was not only severe but also harsh in the given circumstances.
40. It should not be lost that while previously the courts enjoyed judicial discretion in sentencing in sexual offences since the decision in *Maingi & 5 others vs Director of Public Prosecutions & another* (Petition Eo17 of 2021) [2022] KEHC 13118 (KLR) that had declared the minimum mandatory sentences in the SOA unconstitutional, this court is bound by the recent Supreme Court decision in *Petition No. E018 of 2023, Republic vs Joshua Gichuki Mwangi & 3 others*, where the apex Court held that the mandatory sentences under the SOA were constitutional.
41. As already noted, 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* 2006 which provides that upon conviction the offender shall be sentenced to imprisonment for a term of not less than fifteen years.
42. In the given circumstances therefore, I hereby affirm the conviction but substitute the 60-year sentence which is excessive with that of 15 years to commence from the date of sentence by the trial court.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF APRIL 2025

J. N. ONYIEGO

JUDGE

