



**WK v Republic (Criminal Appeal E094 of 2024)
[2025] KEHC 4907 (KLR) (23 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4907 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E094 OF 2024
RM MWONGO, J
APRIL 23, 2025**

BETWEEN

WK APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from the decision of Hon. Njoki Kabara, SRM in
Siakago MCSO No. E041 of 2022 delivered on 01st February 2024)*

JUDGMENT

The Charge

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act*. Particulars are that on 13th September 2022 in Mbeere North subcounty within Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of CK, a child aged 14 years. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on 13th September 2022 in Itira sublocation, Karambari location in Mbeere North subcounty within Embu County, the appellant intentionally touched the vagina of CK a child aged 14 years with his penis.
2. At the trial, the appellant pleaded ‘not guilty’ to the charge. A hearing followed in which four (4) prosecution witnesses testified and the accused opted to remain silent and await the judgment. Subsequently, he was convicted and sentenced to 20 years imprisonment.

Petition of Appeal.

3. Dissatisfied with the decision of the trial court, the appellant, filed a petition of appeal dated 29th November 2024. It seeks orders that the appeal be allowed, the conviction quashed and the sentence of



20 years imprisonment be set aside and that he be set at liberty. The appeal is premised on the grounds that:

- a. The learned trial magistrate erred in both law and fact by failing to protect the will of a fair trial as enshrined under Articles 50(2), 25(c) and 27(1)(2)(4) of *the Constitution*;
- b. The learned trial magistrate erred in both law and fact by rejecting the appellant's defense without giving cogent reasons;
- c. The learned trial magistrate erred in both law and fact by failing to consider that the complainant was giving self-incriminating false information against the appellant; and
- d. The learned trial magistrate erred in both law and fact by convicting the appellant against the weight of evidence whereas the prosecution failed to prove its case beyond reasonable doubt.

The Evidence.

4. PW1, the victim, testified that on 13/09/2022 at around 8.00 p.m, her father, the appellant instructed her to move into her brother's house which is separate from the main house. She obeyed and that is where she slept while her brother moved into her bedroom in the main house. During the night, the appellant went into the house where she was sleeping, touched her breasts, removed his clothes and inserted his penis into her vagina.
5. That night, she did not scream and her father, the appellant, told her not tell anyone about the incident. At the time of the incident, her mother had been chased away from home by the appellant. The following day she told her mother about the incident when her mother visited her at school. She was in tears, so her mother asked for permission to take her with her. Together, they reported the matter at the police station and she was taken to the hospital for examination and treatment. She identified the appellant in Court as her assailant.
6. AN, the victim's mother testified as PW2. She stated that the appellant is her estranged husband. She said she visited her children in school and PW1 told her about the incident that occurred the previous day. She took PW1 to the police station where the incident was reported before they went to the hospital where she was examined and treated. AN produced PW1's Birth Certificate as P.Exhb1. It showed she was born on 18th December, 2007, meaning she was 3 months short of 15 years old.
7. PW3 was John Mwangi a Clinical Officer at Mbeere District Hospital. He examined and treated PW1 on 14/09/2022. He testified that upon examination, the victim's hymen was freshly broken, which was evidence of vaginal penetration. There were no tears or bruises on her genitals. He produced the P3 form and PRC form as P.Exhbs 2 and 3, respectively.
8. PW4 was PC Osuma Henry formerly of Kathanje Police Station who stated that PW1 and PW2 reported the incident. He escorted them to the police station and the appellant was arrested and charged.

Submissions on the Appeal.

9. The appeal was canvassed by way of written submissions.
10. The appellant submitted that the court delivered its judgment before he could give his written defense for consideration. That the evidence of PW1 was inconsistent and doubtful and the court should not have relied on it. He stated that the narrative by PW1 was fueled by her mother and grandmother because he was not in good terms with PW2. He relied on the case of John Mutua Munyoki v Republic



[2017] KECA 376 (KLR) and urged the court to allow the appeal since the elements of defilement were not proved beyond reasonable doubt.

11. On its part, the respondent submitted that the elements of the charge were proved beyond reasonable doubt. Reliance was placed on sections 2 and 8 of the *Sexual Offences Act* and the cases of Hadson Ali Mwachongo v. R. (2016) eKLR, Mwangi v Republic [2022] KECA 1106 (KLR) and AML Vs R. (2012) eKLR. The respondent submitted that the appellant did not offer a defense after he had understood the provisions of section 211 of the *Criminal Procedure Code*, thus, he cannot say that his defense was ignored. On the sentence, the respondent stated that the same was meted out as prescribed in the *Sexual Offences Act*, and relied on the case of Shadrack Kipchoge Kogo v Republic, Eldoret Criminal Appeal No.253 of 2003.

Issues for Determination.

12. The issues for determination are as follows:
 - a. Whether the offence was proved beyond reasonable doubt; and
 - b. Whether the sentence meted out to the appellant should be reviewed.

Analysis and Determination.

13. In the case of Kiilu & Another v Republic [2005]1 KLR 174, the Court of Appeal stated thus regarding the role of an appellate court:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

Whether the offence was proved beyond reasonable doubt.

14. Section 8(1) and (3) of the *Sexual Offences Act* provide:
 - “(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.”
15. Therefore, the elements of the offence may be broken down as follows:
 - a. The age of the complainant must be proved - that the complainant was a child;
 - b. There was penetration of the child as defined under Section 2(1) of the *Sexual Offences Act*;
 - c. The perpetrator was positively identified.



16. PW1 produced her birth certificate (P.Exhb 1) to show that she was born on 18th December 2007. At the time of the incident, she was 14 years, 8 months, 26 days, a child within the meaning of the Children Act.

17. It was PW1's testimony that her father instructed her to switch rooms with her brother, causing her to sleep in her brother's room which is outside her parents' house. That night, her father went to the room where she was sleeping and there touched her breasts before defiling her. The testimony of PW3 corroborated this evidence by PW1. PW3 stated that upon examination of the victim, her hymen was recently broken although there were no tears or bruises on her genitals. In his view, this was sufficient proof of penetration, which under section 2 of the Act is defined as:

'the partial or complete insertion of the genital organs of a person into the genital organs of another person'.

18. The third element is the identity of the assailant. PW1 testified that the appellant is the person who defiled her. She knows him very well because he is her biological father, a man she has grown up knowing. PW2 testified that appellant is her estranged husband. At the time of the incident, they had disagreed and he had sent her away. Given the path chosen by the appellant in failing to give a defense, the evidence before the court on his identification is wholly un rebutted.

19. Moreover, when it comes to identification of an assailant in sexual offences, section 124 of the Evidence Act guides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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.”

20. This provision basically states that owing to the nature of sexual offences (which are often committed in the absence of witnesses besides the victim), the testimony of the victim on identification of the assailant does not need to be corroborated. As such, the provision allows that evidence to identify the appellant as the assailant is properly given even if only by the victim.

21. After being safely convicted, the appellant was sentenced to 20 years imprisonment. The trial court noted his mitigation and gave its reasons for imposing the said sentence which is prescribed under section 8(3) of the Sexual Offences Act. The Supreme Court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) stated that the sentences prescribed under section 8 of the Sexual Offences Act ought to be applied as prescribed. It stated:

“We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision



of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious.”

Conclusions and Disposition.

22. In light of the foregoing discussion, it is my considered view that the conviction was safe. This Court hereby upholds it. The sentence meted out is according to the relevant law and violates nothing, and is also hereby upheld.
23. Accordingly, the appeal lacks merit and is hereby dismissed.
24. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 23RD DAY OF APRIL, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Appellant in Person
2. Ms. Nyika for State
3. Francis Munyao - Court Assistant

