



**DM alias M v Republic (Criminal Appeal E017 of 2024)
[2025] KEHC 7194 (KLR) (26 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E017 OF 2024**

**JN KAMAU, J
MAY 26, 2025**

BETWEEN

DM ALIAS M APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon G. A. Mmasi (SPM) delivered at Vihiga in Senior Principal Magistrate's Court in Sexual Offence Case No 70 of 2014 on 12th May 2014)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. The Learned Trial Magistrate, Hon G. A. Mmasi (SPM) convicted him on the main charge of defilement and sentenced him to life imprisonment.
3. Being dissatisfied with the said Judgement, he lodged an appeal herein. His undated Petition of Appeal was filed on 18th March 2024. He set out seven (7) grounds of appeal.
4. In his undated Written Submissions filed on 22nd October 2024, he incorporated his Amended Grounds of Appeal. The Respondent's Written Submissions were dated 13th January 2025 and filed on 14th January 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. The only discernible ground of appeal was that the Appellant could not recall what had happened during trial. Having looked at the Appellant's Amended Grounds of Appeal and parties' Written Submissions, this court noted that the parties only submitted on the issue of unfair trial and sentencing. However, as it was not clear whether or not the Appellant had abandoned his Amended grounds of appeal on conviction, this court found it prudent to determine the same for completeness of record and to save the court's time. Therefore, the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Appellant was accorded a fair trial;
 - b. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Fair Trial

9. Amended Grounds of Appeal Nos (2) and (3) were dealt with under this head.
10. The Appellant submitted that the trial process was conducted unfairly as the Trial Court did not inform him of his right to apply for legal representation. He invoked Article 50(2) and Article 50(2) (h) of the *Constitution* of Kenya, 2010 and added that the Trial Court did not also consider whether he was supplied with witness statements. He argued that his conviction was derived from an unfair trial, hence null and void.
11. On its part, the Respondent submitted that the Appellant was accorded a fair trial as the Charge was read out to him in a language he understood and he responded to it. It added that the said Charge was proper as it complied with Section 134 of the *Criminal Procedure Code*. It cited Article 50 of the *Constitution* of Kenya and contended that whereas the Appellant faced a serious charge that would attract imprisonment for life, he did not demonstrate that he did not understand the charge facing him or that the case was complex or that he was not able to defend himself.
12. It further submitted that the right to legal representation was not absolute as there were situations where it could be limited. It pointed out that it had to be established that the accused would suffer substantial injustice if one was not accorded legal representation.
13. It added that for the Appellant to benefit from the omission by the Trial Court to accord him state legal representation, he had to demonstrate that from the commencement of the trial he raised concern



about his inability to afford legal representation and that substantial injustice may occur as was held in the case of Charles Maina Gitonga vs Republic[2020]eKLR.

14. It further contended that the Appellant participated in the proceedings by cross examining the Prosecution witnesses and when he was placed on his defence, he opted to give an unsworn statement and did not call any witness. It asserted that he, therefore, understood the charges he was facing and the evidence that was presented. It was emphatic that there was no evidence that he was incapacitated in the trial for lack of legal representation.
15. It further averred that he was supplied with statements before the hearing commenced and that he was also given sufficient time to prepare for the hearing before the case started. It urged this court to dismiss this ground of appeal.
16. Article 50(1) of the Constitution of Kenya, 2010 states that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
17. Article 50(2)(h) of the Constitution of Kenya further provides as follows:-

“Every accused person has the right to a fair trial which includes the right to have an advocate assigned to the accused person by the State and at State expense if substantial injustice would otherwise result, and to be informed of this right promptly.”
18. Article 50(2)(j) of Constitution of Kenya states that:-

“Every accused person has the right to a fair trial which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”
19. A perusal of the proceedings of the lower court showed that the Appellant informed the Trial Court that he was ready to proceed with the case on several occasions. He took plea on 20th January 2014 and the matter was set down for hearing. On 13th February 2014, he sought to be supplied with witness statements and the same were availed by the Prosecution.
20. When the matter came up in court on 4th June 2012, he indicated that he was not ready to proceed with the hearing as he had not been given witness statements. The court ordered that he be supplied with the same. When the matter was coming up for hearing on 27th February 2014, he did not indicate that he had not been supplied with the said witness statements. The Trial Court proceeded to hear the case and he cross-examined the Prosecution witnesses.
21. When the Trial Court found him to have a case to answer and put him on defence on 23rd April 2014, he said that he needed time to defend himself. The Trial Court fixed the defence hearing on 28th April 2014. On the day of his defence hearing, he said he would tender unsworn evidence and would not call any witness. He proceeded to testify. At no point in the proceedings did he requested for counsel or for time to instruct a counsel to represent him during trial.
22. Be that as it may, this court found and held that the Trial Court was under an obligation to have informed him of his right to be represented by counsel as was mandated by Article 50(2)(g) of the Constitution of Kenya, 2010.



23. Notably, Article 50(2)(g) of the Constitution of Kenya provides as follows:-
- “Every accused person has the right to a fair trial, which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly.”
24. Failure by the Trial Court to have informed the Appellant of this right was a great omission. Having said so, it was not always that such omission had to cause an accused person injustice as it could be remedied by way of a retrial if such accused person had completely been prejudiced.
25. In this particular case, the Appellant proceeded with the trial without ever having asked that the Trial Court to give him time to instruct counsel to represent him during trial. Provision of legal representation at the State expense was a progressive right which was currently accorded to persons who had been charged with capital offences only.
26. This court thus came to the firm conclusion that his constitutional and fundamental right to fair trial had not been breached merely because the Trial Court did not inform of his right of legal representation under Article 50(2)(g) of the Constitution of Kenya.
27. In view of the delays that would be occasioned by recalling witnesses due to failure by trial courts to promptly inform accused persons of their right to choose and be represented by an advocate and to be informed of this right promptly under Article 50(2)(g) of the Constitution of Kenya and the right to have an advocate assigned to the accused person by the State and at State expense and bearing in mind substantial injustice that would otherwise result as provided in Article 50(2)(h) of the Constitution of Kenya, trial courts were called upon to comply with these provisions of the law when an accused person was first presented to court and before taking the plea as this was indeed the best practice besides being mandated by the law.
28. In the absence of proof of violation of the Appellant’s right to fair trial, this court was not persuaded that it should find that the trial was rendered a nullity necessitating a retrial.
29. In the premises foregoing, Amended Grounds of Appeal Nos (2) and (3) were not merited and the same be and are hereby dismissed.

II. Proof of Prosecution’s Case

30. Amended Ground of Appeal No (1) was dealt with under this head.
31. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.
32. It is now settled that the ingredients of the offence of defilement are proof of complainant’s age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga vs Republic* [2016] eKLR. This court dealt with the same under the following distinct and separate heads.
33. Notably, the parties did not submit on any of the ingredients of the offence of defilement.

A. Age

34. The Complainant, MK (hereinafter referred to as “PW 1”) testified that she was nine (9) years old. Her mother, VC (hereinafter referred to as “PW 2”) testified that PW 1 was born on 19th August 2005. No



8XX24 CPL Fred Too Cheruiyot (hereinafter referred to as “PW 5”) produced PW 1’s Immunisation Card as exhibit which showed that she was born on 19th August 2005.

35. This court had due regard to the case of Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010 (unreported) where the Court of Appeal stated that the age of a minor in a charge of defilement could be proved by medical evidence and documents such as baptism cards, school leaving certificates. It could also be proved by the victim’s parents or guardian and observation or common sense as was held in the case of Musyoki Mwakavi vs Republic (Supra).
36. According to the Immunisation Card that PW 5 tendered in evidence, PW 1 was born on 19th August 2005. The incident occurred on 10th January 2014. She was therefore eight (8) years, six (6) months old at the material time.
37. The Appellant did not challenge the production of the aforesaid Immunisation Card and/or rebut this evidence by adducing evidence to the contrary. This court was, therefore, satisfied that PW 1’s age was proven beyond reasonable doubt and that she was a child at all material times.

B. Identification

38. Notably, PW 1 testified that on the material day of 10th January 2014, PW 2 left her at home and went to look for drugs for her grandmother. She was left with her father. The Appellant, who was her uncle came and asked her to go and light his jiko at his house, which she did. The Appellant came, placed her on his bed, removed her pant, removed his trouser and penis and penetrated her vagina. She stated that she felt pain and when she wanted to scream, he gagged her mouth with his hand and warned her not tell anyone of what had transpired otherwise he would beat her up.
39. PW 2 told the Trial Court that PW 1 told her that the Appellant defiled her. She said that she saw PW 1’s vagina swollen and emitting a yellow discharge when she was washing her after she came from school. She said that she told her to Vihiga District Hospital and Chavakali Police Patrol Base where she reported the incident. She confirmed that the Appellant was her brother-in-law, hence PW 1’s uncle.
40. Without belabouring the point, this court came to the firm conclusion that the ingredient of identification was proven beyond reasonable doubt as PW 1 and the Appellant were not strangers because they were relatives and neighbours. PW 1 positively identified him as her perpetrator on that material day.

C. Penetration

41. Sammy Chelule (hereinafter referred to as “PW 4”) observed that PW 1’s vagina was swollen and reddish, the hymen was painful and swollen while her labias were swollen, painful and bruised. He noted that the cervix was a bit bruised, there was tear on the labia and that she was emitting a foul smell from the discharge. He concluded that she had been defiled. He produced P3 Form, Post Rape Care (PRC) form and treatment notes as exhibits in this case.
42. It was clear from the evidence that was adduced during trial that the ingredient of penetration had been proved beyond reasonable doubt. PW 1’s evidence on penetration was corroborated by the scientific observation of PW 4 and thus, the ingredient of penetration was proved
43. The Appellant had the opportunity to adduce evidence in his defence to rebut the evidence that was adduced by the Prosecution. He did not give an alibi of where he was on the material date. He only stated that he was arrested by the Assistant Chief and taken to Mbale Police Station from where he was charged with the offence herein. It was clear to this court that his defence was a mere denial.



44. Weighing his evidence against that of the Prosecution witnesses, this court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that he defiled PW 1 on the material date.
45. In the premises foregoing, Amended Ground of Appeal No (1) was, therefore, not merited and the same be and is hereby dismissed.

III. Sentencing

46. Amended Grounds of Appeal No (4) and (5) were dealt with under this head.
47. The Appellant submitted that due to the mandatory nature of the sentence that was meted on him, the Trial Court's hands were tied hence failure to exercise discretion in sentencing. He added that his mitigation circumstances were not taken into account as part of trial hence the imposition of his sentence was not a judicial evaluated sentence but a legislature fiat.
48. He argued that due to the mandatory nature of the said sentence, his rights under Article 27(1)(2) of the Constitution of Kenya were violated since the provision of Section 216 and 329 of the Criminal Procedure Code were made inapplicable during the determination of his sentence. He placed reliance on several cases among them the case of Evans Wanjala Wanyonyi vs Republic and Julius Kitsao Manyeso vs Republic Criminal Appeal No 12 of 2021 (eKLR citations not given) without mentioning the holdings he relied on therein.
49. On its part, the Respondent invoked Section 8(2) of the Sexual Offences Act and placed reliance on the case of Supreme Court Petition No E018 of 2023 Republic vs Joshua Gichuki Mwangi (eKLR citation not given) where it was held that although sentencing was an exercise of judicial discretion, it was Parliament and not the Judiciary that set the parameters of sentencing for each crime. It contended that the sentence that was meted out to the Appellant was lawful.
50. It further cited the cases of Shadrack Kipchoge Kogo vs Republic Criminal Appeal No 253 of 2003 (eKLR citation not given) and Wanjema vs Republic (1971) EA 493 where the common thread was that an appellate court would not interfere with the discretion which a trial court had exercised unless it was evident that it took into consideration some immaterial facts or acted on wrong principles or the sentence was manifestly excessive in the circumstances of the case.
51. It further invoked Section 329 of the Criminal Procedure Code and contended that the Trial Court took into account the evidence, the nature of the offences and the circumstances of the case in arriving at the appropriate sentence. It urged the court to dismiss the Appellant's appeal and uphold his sentence.
52. The Appellant herein was convicted under Section 8(1) as read with Section 8(2) of the Sexual Offences Act Cap 63A (Laws of Kenya). Section 8(2) of the Sexual Offences Act provides that:-

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
53. The Trial Court convicted the Appellant to life imprisonment. This court could not therefore fault it in that regard as the sentence was lawful.
54. In its decision of 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR which had reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it had been held that Section 8 of the Sexual Offences Act had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of



courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence. It stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.

55. Previously, there had been emerging jurisprudence that substituted life sentences with thirty (30) or forty (40) years pursuant to the holdings of two (2) separate benches of the Court of Appeal in *Ayako vs Republic (Criminal Appeal 22 of 2018)* [2023] KECA 1563 (KLR) (8 December 2023), (Judgment), and *Manyeso vs Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment) respectively.
56. However, in its decision that was delivered in Petition No E013 of 2024 *Republic vs Julius Kitsao Manyeso* on 11th April 2025, the Supreme Court of Kenya overturned the decision of the Court of Appeal in *Manyeso vs Republic (Supra)* and rendered itself as follows:-

“ 68. Courts cannot therefore extend their determination to rectifying or amending the statute in question, as this would contravene the doctrine of separation of powers, which delineates the functions of the judiciary, legislature, and executive. Courts must exercise caution when crafting remedies to avoid overstepping their judicial mandate and intruding upon legislative functions by prescribing or enacting amendments. When courts recognize the need for legislative intervention, and it is both proper and imperative for them to recommend such measures to be to the appropriate authorities for adoption....

69. We therefore find no difficulty in finding that the Court of Appeal erred in substituting the life imprisonment with a 40- year sentence, thereby usurping the legislative power to define sentences....

72. Consequently our final orders are as follows:-

- a. The Petition of Appeal is hereby allowed.
- b. The life imprisonment that was imposed by the trial court and affirmed by the High Court is hereby reinstated.
- c. The Respondent, Julius Kitsao Munyeso shall therefore complete the life imprisonment imposed by the trial court.”

57. Further, in its decision in Petition No E002 of 2024 *Republic vs Evans Nyamari Ayako* that was also delivered on 11th April 2025, the Supreme Court overturned the Court of Appeal decision in the case of *Ayako v Republic (Supra)*. It pronounced itself as follows:-

“ 52. In the instant case, the Court of Appeal in its judgment, referred to the case of *Manyeso vs Republic Case*, where a different bench of the Court of Appeal cited the *Muruatetu I* case in stating that the rationale therein applied *mutatis mutandis* to the issue of mandatory indeterminate sentence.

53. In the *Muruatetu II Case* we reiterated that the rationale of the *Muruatetu I* was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the *Penal Code*. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence...



54. It is therefore abundantly clear that it was not open to the Court of Appeal to apply the ratio decidendi in Muruatetu I in the instant matter. Therefore to the extent that the Court of Appeal did so, it has offended the principle of stare decisis.

58. Consequently, and for the reasons aforesaid, we make the following orders:-

1. The Appeal dated 1st February 2024 is allowed.
2. The Judgment of the High Court is hereby reinstated.
3. For the avoidance of doubt, the Respondent shall serve life imprisonment as sentenced by the Magistrate's Court..."

58. It was therefore abundantly clear that the Supreme Court had pronounced itself on the validity of the life sentence that had been prescribed for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.

59. Given that this court was bound by the decisions of courts superior to it in the principle of stare decisis, this court had no option but to uphold the life imprisonment that was imposed by the Trial Court.

60. In view of the fact that the sentence herein was indeterminate, this court could now not consider the provisions of Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

Disposition

61. For the foregoing reasons, the upshot of this court's decision was that the Appellant's undated Amended Grounds of Appeal that was lodged on 22nd October 2024 was not merited and the same be and is hereby dismissed. The conviction and the sentence be and are hereby upheld as they were both safe.

62. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF MAY 2025

J. KAMAU

JUDGE

