



REPUBLIC OF KENYA



**Lesikel v Republic (Criminal Appeal E021 of 2024)
[2025] KEHC 5999 (KLR) (12 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CRIMINAL APPEAL E021 OF 2024
SC CHIRCHIR, J
MAY 12, 2025**

BETWEEN

SINCHA LESIKEL APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment of Hon. L .Mutai (CM) delivered on 30/01/2024
at the chief Magistrate’s Court at Isiolo in sexual offences case No. E003 of 2022)*

JUDGMENT

1. Sincha Lesikel, the Appellant herein, was charged with the offence of defilement contrary to Section 8(1) as read with section 8(2) of the Sexual Offence Act No. 3 of 2006. The particulars were that on the 20th December, 2022 at about 12 hours in Nd’onyowasin Location, in Samburu County, intentionally and unlawfully caused penetration of the vaginal of ML a child aged 10 years with his penis.
2. He faced an alternative charge of having an indecent act with a child contrary to section 11(1) of the Sexual offence act.
3. He was convicted on the main charge and sentenced to life imprisonment. He was aggrieved by the outcome and filed the present appeal.

Petition of Appeal

4. In an Amended Petition of Appeal, the Appellant has set out the following grounds.
 1. That the learned trial magistrate erred in law and fact by failing to inform the appellant of his right of representation as enshrined under article 50 (2) (g) (h) of the constitution, thus the appellant was not accorded a fair trial.



2. That the learned trial magistrate erred in law and fact by failing to note that the key witness was not called.
 3. That the learned trial magistrate erred in law and fact by failing to consider the age of the appellant.
 4. That the learned trial magistrate erred in law and fact by failing to note that the prosecution failed to prove their case beyond reasonable doubts according to the law.
 5. That the learned magistrate erred in law by failing to consider that the legal provision for maximum/minimum sentence under section 8(4) of the *Sexual Offences Act* denies the judicial officers their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair to breach of Article 27 (1) (2) (4) of *the constitution* of Kenya. Hence, the sentence imposed on the appellant is unlawful.
 6. That the trial magistrate erred in both matters of law and facts by failing to consider the appellant defence.
5. The appeal proceeded by way of written submissions.

Appellant's submissions

6. It is the Appellant's submissions that his right to legal representation was violated; that he was never given an advocate despite the fact that the offence he was faced with attracted a life sentence. He argues that owing to the severity of the sentence, he ought to have been assigned an advocate by the state.
7. The Appellant further submits that the trial magistrate erred by failing to consider the age of the Appellant, which as per the assessment report, he was approaching 18 years.
8. It is further argued that the person who allegedly arrested the Appellant were not called as witnesses.
9. It is submitted that though an identification parade was carried out, the investigation's officer could not explain to the court how the same was carried out.
10. The Appellant submit that the trial magistrate erred by failing to observe that the mandatory minimum sentence under Section 8(2) of the *sexual offences Act* is unconstitutional to the extent that it denies the court the right to exercise discretion when passing sentence. As a result his right to fair trial, the right to dignity and equality were infringed. In this regard, the Appellant has relied on the on the decision of Justice Odunga in *Maingi & 5 Others Vs DPP & Anor (2022) KEHC 13118 (KLR)* and *Julius Kitsao Mangeso Vs Republic (2023) eKLR*.
11. It is finally submitted that the identity of the Appellant was not proved beyond reasonable doubt.

Respondent's submissions

12. On identification of the perpetrator, the respondent submits that the incident happened during the day and there could not have been any mistake on the identification of the Appellant by the complainant. Further, it is stated, the Appellant placed himself on the scene.
13. It is submitted that penetration was proved by P3 form, PRC and the testimony of pw3, all of which indicated that the complainant sustained bruises on her labia and the hymen was partially torn.
14. On the age of the complainant it is submitted that an age assessment report was produced by PW4 which showed that the complainant was 11 years at the time.



15. It is submitted that the age of the Appellant was assessed at 18 years following request by the prosecution, prior to the plea taking.
16. The Appellant contends that the Appellant was not facing a capital offence so as to qualify for state funded legal representation; that there was no evidence of complex issues in the case. It is stated that he cross examined witnesses and therefore there was no substantial injustice suffered.
17. In response to the Appellants submissions that some vital witnesses were left out, the respondent has relied on section 143 of the *Evidence Act* which states that no particular number of witnesses are required to prove a fact. It is further stated that the people that the Appellant were not eye witnesses.
18. It is the Appellant's final submission that the sentence was not excessive and was lawful in any event.

Analysis and determination

19. This is a first Appeal and the role of this court is well settled. It is to review the evidence as tendered at the trial court evaluate it and arrive at its own conclusion. However allowance must be made for the fact that the trial court had the advantage of observing the witnesses' demeanour and hearing them first hand. (See *Gitobu Imanyara & 2 others vs AG(2016) e KLR*).
20. I have considered the petition of appeal, the record of the trial court and parties' submissions and based on the said considerations, I have identified the following issues for determination:
 - a. Whether the Appellant right to fair trial was infringed.
 - b. Whether the Age of the Appellant was determined.
 - c. Whether the offence of defilement was proved.
 - d. Whether material witnesses were left out.
 - e. Whether the sentence was excessive and/or unconstitutional.

Whether the Appellant's right to fair trial was infringed

21. The appellant has submitted that though he faced a potential life sentence, he was not assigned an advocate. Under Article 50 (2) (h) of *the constitution* the right to fair trial includes the right; "to have an advocate assigned to the accused person by the state and at state's expense, if substantial injustice would otherwise result, and to be informed of this right promptly" .
22. The key word is "if substantial injustice would occur". The same provision is found in section 36 (4) (K) of the *Legal Aid Act*. And what constitutes substantial injustice is provided for under Section 43 1(A) of the same Act. It provides that in determining whether substantial injustice is likely to occur the court shall take into consideration; the severity of the charge, the complexity of the case, and the capacity of the accused to defend himself. Also in *Stephen Odour Nyahaga Vs Republic (2020) eKLR* the court held: "-----it is clear that with regard to criminal matters in determining whether substantial injustice will be suffered a court has a right to consider; in addition to the relevant provisions of the *Legal Aid Act* various other facts which include the seriousness or nature of the offence in question, the severity of the sentence and whether the accused is a minor".....
23. While I agree that the sentence is severe, as submitted by the respondent the case was not complex. I also noticed that the Appellant had the capacity to represent himself as he was able to cross- examine witnesses. He also did not raise the issue of representation with the trial court. In this regard I have relied on the court of Appeal decision in the case of *Manyeso v Republic [2023] KECA 827 (KLR)* the court



stated : “This court (Kairu, Mbogholi-Msagha and Nyamweya JJA) held in William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) *v Republic (Criminal Appeal 49 of 2020)* [2022] KECA 23 (KLR) that the operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial. The court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since *the Constitution* demands it. However, in the present appeal, the appellant did not raise the issue of legal representation either in the trial court and the High Court, and the record of the trial court shows that the appellant participated in the trial and cross-examined the witnesses, and it is not evident that he suffered any or any substantial injustice. For these reasons, we do not find any merit in the appellants arguments that their rights to a fair trial on under articles 50(2)(g) and 50(2)(h) of *the Constitution* were violated.”

24. It is therefore my finding that the Appellant’s complaint in this regard is without merit.

The Age of the Appellant

25. The Appellant has faulted the trial court for failing to appreciate that “he was approaching 18 years”. That is not what the age assessment report ordered by the trial court states. The Doctor stated that the Appellant was about 18 years. It means it could be slightly less or more and that is taken to mean 18 years. It is in the same way that the complainant was assessed to be about 11 years.

Whether the offence of defilement was proved

26. Section 8(1) of the Sexual Offence Act provides as follows; A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. It is well settled that pursuant to the provision of Section 8(1) and several past decisions of the courts that the offence of defilement carry three ingredients, each of which must be proved for the prosecution to secure a conviction. The ingredients are ; -Age of the victim, the identity of the perpetrator and finally proof of penetration.

Age of the victim

27. The sexual offences cases under section 8 of the Act , attract different different imprisonment terms, upon conviction, depending on the age of the victim , and hence the mandatory requirement to prove the age of the victim. The record shows that an age assessment was carried out at Isiolo District Hospital on 11/01/2022 which indicated that the complainant was 11 years, and the report was produced. I am therefore satisfied that the age of the complainant was duly proved.

The identity of the perpetrator

28. The complainant told the court that she identified the accused person at the police station. She also identified him in court. The Appellant has argued that the identification was not beyond reasonable doubt. He also referred to an identification parade. However, there are no identification forms on record and the investigation officer never made any reference to such a parade. The complainant further states that the attack took place during the day and she saw the attacker well. She further gave a full description of the clothes that the attacker wore at the time of the incident. she stated that he wore “ a rosary, a yellow scarf, red “lesso” and “akalas.....He also had a yellow beaded necklace”. This description was not contested at all during cross examination

29. Finally, the Appellant placed himself on the scene. He stated “ I met some children” then “it was first one child looking after goats”. He stated that he beat her a bit for refusing to take the goats home. On



cross-examination he stated “I met the child, the complainant at about 5 pm. It was day time. I was with another Moran. I saw the complainant well and she too must have seen me very well----”

30. The above Appellant’s own testimony thus corroborates that of the complainant on the issue of identification. I am therefore satisfied that the element of identification of the perpetrator was proved to the required standard.

Penetration

31. The *Sexual Offences Act* at Section 2 defines penetration to mean “partial or complete insertion of genital organs of a person into the genital organs of another person”. The complainant’s testimony in this regard went as follows: “He removed my clothes and did bad things. He caused me pain to my lower stomach and my place of urinating.....”
32. The court have long accepted that the use of such euphemisms as “ did bad things” is child’s way of understanding and describing the act of Sexual intercourse. In the case of *Muganga Chilejo Salha v Republic* [2017] eKLR ,the Court of Appeal, while acknowledging the use of euphemisms by children when describing acts of sexual intercourse stated: -

“Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a courtroom. If the trend in the decided cases is anything to go by, courts in this country have generated/accepted the use of euphemisms like, “alinifanyia tabia mbaya”, (*IE v Republic, Kapenguria High Court Criminal Case No. 11 of 2016*) “he pricked me with a thorn from the front part of this (sic) body.” (*Samuel Mwangi Kinyati v Republic, Nanyuki HC Criminal Appeal No. 48 of 2015*), “he used his thing for peeing”, (*David Otieno Alex v Republic, Homa Bay HC Criminal Appeal No. 44 of 2015*), “he inserted his “dudu” into my “mapaja” (*Jose Kaburu v Republic, Meru HC Criminal Case No. 196 of 2016*), “he used his munyunyu” (*Thomas Alugha Ndegwa, Nairobi HC Criminal Appeal No. 116 of 2011*) as apt description of acts defilement. We, however, need to remind trial courts that the use of certain words and phrases like “he defiled me” which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See *AM v Republic Voi HC Criminal Appeal No. 35 of 2014*, *EMM v Republic Mombasa HC Criminal Case No. 110 of 2015*, among others.” (Emphasis added).

33. Further the penetration was corroborated by medical evidence. The clinical officer (PW3) told the court that on examining the complainant, he found that there were bruises on the labia, there was blood stain on the genitalia and she complained of pain; she had red discharge and the hymen was partially torn. The entries on the P3 (Pexb 2) , treatment notes (Pexb) and the PRC forms indicate that the complainant was defiled. Thus this element of the offence was equally proved.

Were vital witnesses left out?

34. PW2 told the court that she sent some young men to follow a trail the attacker was suspected to have left. The Appellant has argued that this person(s) were not called as witnesses. There is no obligation on the part of the prosecution to call all the witnesses . The only requirement is such a number as may be sufficient to prove their case.(see section 143 of the *Evidence Act*).
35. I have considered the role of the alleged witness(es.) There was no indication on what their trailing yielded. It is also the evidence of the complainant and PW2 that they found the Appellant at the police



station. The Appellant assertion that those were the people who arrested him has no evidential basis therefore.

Sentence

36. The Appellant has submitted that the life sentence was harsh, and it violated his right to fair trial, equality and dignity of the person. The Appellant's submissions is clearly informed by the reasoning of the Supreme court in *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] KESC 2 (KLR). However, the Supreme court did clarify that their decision and hence reasoning, on *Murautetu* case was limited to only Section 204 of the *Penal Code*.
37. The Appellant has further relied on the decision of *Manyeso v Republic* [2023] KECA 827 (KLR) by the court of Appeal on the declaration of the unconstitutionality of life sentence. However, that declaration has been overturned by the supreme court in *Republic v Manyeso* [2025] KESC 16 (KLR).
38. The trial court took into account the vulnerability of the child, the traumatic effects of defilement. I will add that taking into account the tender body of a 11-year-old, the penetration was also traumatic to the child's genitalia. I am therefore satisfied that the sentence was not only mandatory minimum prescribed by law, but was also commensurate to the severity of the offence.
39. In the end, I find no merit in this appeal. The findings of the court below is upheld, and appeal dismissed.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 12TH DAY OF MAY 2025

S. CHIRCHIR

JUDGE

In the presence of:

Kavashe Gollo- Court Assistant

Sincha Lesikei-The Appellant

Mr. Ngetich for the Respondent.

