



REPUBLIC OF KENYA



KENYA LAW
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**PKM v Republic (Criminal Appeal E120 of 2023)
[2025] KEHC 8149 (KLR) (4 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E120 OF 2023
CW GITHUA, J
JUNE 4, 2025**

BETWEEN

PKM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of Hon A. Okullo (RM) delivered on 19th October 2023 in Murang'a Chief Magistrate's court Sexual Offence case no. E007 of 2022)

JUDGMENT

1. The appellant, PKM was convicted of the offence of defilement Contrary to Section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#) No.3 of 2006 (hereinafter the SOA).
2. The particulars of the offence were that on 28th April 2022 at about 0000hrs in Township Location, Makuyu Sub-County, the appellant wilfully and intentionally caused his genital organ to penetrate the vagina of IWW, a child aged 13 years.
3. Upon his conviction, the appellant was sentenced to serve 20 years imprisonment. He was dissatisfied with his conviction and sentence hence this appeal.
4. In his petition of appeal dated 17th November 2023, the appellant advanced seven grounds of appeal which were in the main replicated. In summary, he complained that the learned trial magistrate erred in law and fact by: basing his conviction on inconsistent and contradictory prosecution evidence which was insufficient to prove his guilt beyond any reasonable doubt; making findings which were not supported by the evidence on record; disregarding his defence and shifting the burden of proof from the prosecution to him.

On the above grounds, the appellant urged this court to allow his appeal, quash his conviction and set aside his sentence.



5. During hearing of the appeal, the appellant was represented by learned counsel Ms Macharia who was instructed by the firm of C.W. Macharia & Associate Advocates. Both the appellant and the respondent chose to prosecute the appeal by way of written submissions which both parties duly filed.

The appellants submissions were filed on 15th November 2024 while those of the respondent were filed on an undisclosed date on the court's E-filing platform but are dated 19th September 2024.

6. In his submissions, the appellant argued that there were evidential gaps in the prosecution's case which pointed to the case being a fabrication by PW2 owing to their failed relationship which the learned trial magistrate failed to appreciate; that the medical evidence adduced by the prosecution did not conclusively prove penetration and that on the whole, the appellant's conviction was improper as it was not based on any tangible evidence especially because crucial witnesses like the neighbour identified by the victim as "cucu" was not called to testify in support of the prosecution case.

Further, the appellant submitted that the learned trial magistrate erred by disregarding his alibi defence for no good reason.

7. The appeal was contested by the State. In submissions filed on behalf of the respondent, learned prosecution counsel Ms. Muriu contended that through its five witnesses, the prosecution had proved all the essential ingredients of the offence of defilement beyond any reasonable doubt; that under Section 143 of the *Evidence Act*, the prosecution had an option of calling only witnesses who were sufficient to prove a fact. Further, Counsel submitted that the appellants conviction was based on Section 124 of the *Evidence Act* and the claim that the charges were a fabrication by PW2 could not arise. The respondent also urged this court to find that the alibi defence mounted by the appellant was an afterthought.

8. This being a first appeal, this court is duty bound to exhaustively re-evaluate the evidence presented before the trial court in order to arrive at its own independent conclusion regarding the soundness or otherwise of the appellant's conviction and sentence bearing in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage.

See: *Okeno V Republic* 1972 EA 32

9. Having carefully considered the grounds of appeal, the evidence on record and the oral written submissions filed on behalf of the parties, I find that the key issue that falls for my determination is whether the evidence adduced by the prosecution in the trial court proved the offence of defilement against the appellant beyond any reasonable doubt.

10. It is trite that to sustain a conviction for the offence of defilement, the prosecution must prove beyond any reasonable doubt three essential ingredients of the offence which are;

- (i) Age of the victim who must be a minor.
- (ii) Penetration.
- (ii) Identity of the accused as the perpetrator of the offence.

See: *Mbuvi V Republic* [2023] KECA 761 (KLR)

11. Starting with the first ingredient, the particulars of the charge alleged that the victim in this case was 13 years old. This age was confirmed by the victim in her evidence and that of her mother (PW3) as well as the medical evidence in the P3 form produced in evidence by PW2. PW 5, the investigating officer produced the victim's birth certificate as P Exhibit 5 which showed that the victim was born on 24th November 2008. Besides, the victim's age as stated in the charge sheet was not disputed by the



appellant. I therefore agree with the trial court's finding that the victim's age which proved that she was a minor at the material time had been proved beyond any doubt.

12. With regard to the element of penetration, Section 2 of the *Sexual Offences Act* defines penetration as the complete or partial insertion of the genital organs of a person into the genital organs of another person.

In this case, the victim who testified as PW1 recalled that on the evening of 28th April 2022, she was in their single roomed house together with the appellant who was her step father and her mother (PW3). The appellant picked a fight with her mother who left the house and did not come back until the following morning.

After PW3 left, she was left with the appellant alone in the house. The appellant closed the door, switched off the lights and found her on her bed. He started touching her breasts and then proceeded to penetrate her vagina using his genital organ. The victim described her ordeal to the trial court in the following words;

“He put his private part in me. He put his penis in mine (kwa kasusu). I felt pain. I cannot recall how long it took. I told him to leave me alone. It was around 10 pm.....”

13. According to PW1, when she told the appellant to leave her alone, he called her a devil and threatened to kill her and to never give her money if she told her mother what had happened. As she was scared that the appellant may actualize his threat, she did not tell PW3 what had happened to her when she returned home the following morning. Instead, she reported the matter to PW3's friend who was also a neighbour called Mama Toma.
14. On her part, PW3 recalled that on 29th April 2022 at around 9.00 p.m., the appellant who was her Ex-husband went to her house. He found her in the company of PW1. A quarrel developed between them and when the appellant became violent, she escaped to a neighbour's house where she spent the night.
15. On the following morning, she went back to the house and still found the appellant. PW1 was lying on the floor. She sent her to the shop to buy milk but she resisted complaining of a headache. As PW1 did not go to school for two days, she decided to take her to hospital but before doing so, she sought assistance from two of her neighbours who included PW4. The minor confided to her neighbours that the appellant had sexually assaulted her and they took her to Murang'a Police Station. At the police station, PW1 narrated her ordeal to PW5 PC Wambui in the presence of her mother. PW5 issued them with a P3 form which was filled by PW2, a clinical officer at Murang'a Level 5 Hospital.
16. In his evidence, PW2 recalled that when PW1 was medically examined on 1st May 2022, a blood like discharge was found in her vagina. There was a tiny bruise on the vaginal entry and her hymen was torn. A high vaginal swab which was subjected to laboratory tests revealed an ongoing bacterial infection but no spermatozoa was found. In cross- examination, PW2 stated that the bruising on the vaginal entry was evidence that the hymen was freshly torn. This coupled with the presence of bacterial cells which were progressing to an infection led him to conclude that there was penetration.
17. After my own appraisal of the evidence, I am satisfied that the evidence of PW1 taken together with the medical evidence adduced by PW2 as well as the evidence of PW3 regarding PW1's behaviour when she returned home including her observation that PW1 was walking abnormally and had a blood stain on her trouser amounted to conclusive proof of penetration.
18. The appellant in his submissions argued that there was no evidence of penetration since no spermatozoa was found in PW1's private parts. In my view, this submission cannot hold water given the definition I have given earlier regarding what in law constitutes penetration which includes partial



insertion of the genital organ of a person into the genital organ of another. It does not have to involve full sexual intercourse. In this case however, though PW1 testified that the appellant had actually had sexual intercourse with her, she recalled that she had taken a shower before she was medically examined and this may have washed away any evidence of spermatozoa.

20. Regarding the last element of identification, there is no doubt that the appellant was very well known to both PW1 and PW3 prior to the material date. It is not disputed that the appellant was PW3's ex-husband and was therefore PW1's stepfather. In fact, PW1 in her evidence referred to the appellant as her father. Their identification of the appellant as the person who visited their house on the night of 28th April 2022 and thereafter sexually assaulted PW1 was based on recognition in circumstances which made his identification reliable and free from any possibility of error. I agree with the learned trial magistrate's finding that the appellant's defence of alibi when compared to the rest of the evidence cannot be true and must have been an afterthought.

21. In view of the foregoing, I am unable to fault the trial court's finding that the prosecution had proved the charge of defilement against the appellant beyond any reasonable doubt. Contrary to the appellant's claim, this finding was based on concrete and cogent evidence which was before the trial court and its validity cannot be impeached.

In the premises, it is my finding that the appellant's conviction was safe and proper and it is consequently upheld.

21. On sentence, the appellant complained in his submissions that the sentence of twenty years imprisonment imposed by the trial court was harsh and was passed without considering the nature and circumstances of the offence, his relationship with the victim's family among other factors.

22. My brief response to the appellant's submissions is that under Section 8 (3) of the *Sexual Offences Act*, the mandatory minimum sentence for the offence of defilement where the victim is aged between twelve and fifteen years is twenty years imprisonment. And whereas in recent years there has been jurisprudence emerging from the High Court and the Court of Appeal to the effect that minimum mandatory sentences prescribed in the *Sexual Offences Act* were unconstitutional to the extent that they fettered the court's discretion in imposing appropriate sentences depending on the peculiar circumstances of each case, the Supreme Court in Republic V Joshua Gichuki Mwangi Petition E018 of 2023 overruled the Court of Appeal and held that minimum mandatory sentences provided in the *Sexual Offences Act* were lawful and were not unconstitutional. In the circumstances, I find no basis to entertain the appellant's complaint that the sentence meted out on him by the trial court was either harsh or unlawful.

23. The learned trial magistrate had discretion to impose an even longer sentence but she chose to pass the least severe sentence prescribed by the law. The sentence was thus lawful as it was in accordance with the law. I find no reason to disturb it and it is therefore confirmed.

24. For all the above reasons, it is my conclusion that this appeal lacks merit and it is accordingly dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 4TH JUNE, 2025.

HON. C. W. GITHUA

JUDGE

In the presence of :



The Appellant

Ms. Macharia for ther Appellant

Ms. Muriu for the Respondent

Ms. Susan Waiganjo, Court Assistant

