PKM v Rebuplic (Criminal Appeal E035 of 2024)
[2025] KEHC 9535 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9535 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL E035 OF 2024

FN MUCHEMI, J

JULY 3, 2025

BETWEEN

PKM ..... APPELLANT

AND

REBUPLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Senior Principal Magistrate Court in Gatundu by Honourable W. Ngumi (SPM), in Criminal Sexual Offence Case No. E006 of 2023 on 24th August 2023)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Senior Principal Magistrate Gatundu in Criminal Case [S.O.] No. E006 of 2023. He was charged with the offence of defilement contrary to Section 8[1] as read with 8[2] of the *Sexual Offences Act* No. 3 of 2006 and an alternative charge of committing an indecent act with a child contrary to Section 11[1] of the *Sexual Offences Act* No. 3 of 2006. He was convicted of the principal charge and sentenced to forty [40] years imprisonment.

2. Being aggrieved by the judgment of the court, the appellant lodged the instant appeal citing 5 grounds which are hereby summarised as follows:-

    a. The learned trial magistrate erred in law and in passing the judgment convicting the appellant when the prosecution had not proved its case by discharging the required burden of proof;

    b. The learned trial magistrate erred both in law and in fact in convicting the appellant based on the complainant's single evidence without giving the reason for her believing in the said complainant's testimony.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that the prosecution did not prove the element of penetration as the victim, PW1 testified using colloquial terms stating that the appellant inserted his kanyonyo in her kanyonyo, which lacks the necessary precision and clarity to unequivocally establish penile penetration into her vagina. Furthermore, the clinical officer's findings did not indicate any presence of spermatozoa cells seen. The appellant argues that the absence of spermatozoa is a significant indicator that penile penetration did not occur.

5. The appellant submits that the prosecution failed to establish a prima facie case against him by heavily relying on hearsay evidence from PW2 and PW3 who narrated what the victim allegedly told them. Further, the evidence of PW1 was not corroborated by independent evidence and the medical evidence presented by PW7, clinical officer did not conclusively link him to the alleged offence as no DNA or other forensic evidence was provided. Further, PW6, the investigating officer admitted to not visiting the scene of the alleged crime or interrogating him which undermines the credibility of the prosecution's case.

6. The appellant argues that PW1 provided testimony which was inconsistent and lacked coherence as she alleged that both her father and brother committed the acts yet no corroborative evidence was presented to substantiate the involvement of her brother. Furthermore her testimony regarding the timing and frequency of the alleged acts was vague and contradictory. PW5, the arresting officer admitted uncertainty about the number of people present in the house during his arrest raising doubts about the reliability of the arrest procedure and subsequent investigation.

7. The appellant submits that the learned magistrate erred in law by failing to adequately consider his plausible defence thereby violating his right to a fair trial as guaranteed under Article 50[2] of *the Constitution* of Kenya. The appellant testified that his wife had abandoned the family leaving him as the sole caregiver; he had been

   caring for his children alone for over a year; he expressed concern for his children and refused to place them in an institution; he noted that the complainant had gone with the teacher and his son told him that; he suggested that the complainant may have been influenced to fabricate the allegations and he suggested the child's injuries could have been from playing with other children.

8. The appellant submits that the sentence of forty years meted against him is harsh and excessive in light of the mitigating factors and the established principles of sentencing. The appellant argues that since he was a first time offender, he ought to have been treated with more leniency. The appellant further opposes the respondent's application for enhancement of sentence to life imprisonment as it is unfounded in law and is based on a misinterpretation of the principles of sentencing and provisions of the *Sexual Offences Act*. Enhancement of the sentence to life imprisonment would be disproportionate and would disregard his mitigating factors.

The Respondent's Submissions

9. The respondent submits that the prosecution proved its case beyond reasonable doubt. The respondent refers to Section 8[1] and 8[2] of the *Sexual Offences Act* and the case of Kyalo Kioko v Republic [2016] eKLR and submits that it proved the ingredients of the offence of defilement. The respondent submits that it produced as an exhibit, the complainant's birth certificate which shows that

the minor was born on 30/7/2018. At the time of the offence, the complainant was four years and 8 months old and thus a child of tender years and therefore in the bracket defined by Section 8[2] of the *Sexual Offences Act*. The respondent relies on the case of Mwalango Chichoro Mwanjembe v Republic [2016] eKLR and submits that the prosecution proved the age of the complainant.

10. Relying on Section 2 of the *Sexual Offences Act* and the case of Mark Oiruri Mose v Republic [2013] eKLR, the respondent submits that PW1 testified that the appellant, her father removed her clothes and inserted his 'kanyonyo' in her 'kanyonyo' and pointed to her vagina. Upon being recalled for further cross examination, PW1 confirmed that the appellant defiled her. the respondent submits that PW7, a clinical officer adduced evidence which proved penetration. The clinical officer testified that PW1's labia minora and the vaginal opening was tender to touch and painful. The vaginal orifle was tender too and she had puss cells. The witness further testified that there were no spermatozoa cells present and that the complainant's hymen was absent. The witness produced the outpatient treatment notes, PCR Forms, P3 Form and lab requisition forms as exhibits. Thus, the respondent submits that the element of penetration was proven.

11. The respondent submits that proof of participation of an accused person is crucial as it enables one to determine who to attach criminal responsibility to. The respondent submits that the evidence

    on record is that the minor is the daughter of the appellant. The complainant testified that the appellant would pick her from her bed where she slept with her brother and take her to the upper bed where he would undress her and insert his 'kanyonyo' in her 'kanyonyo' when she lay on him. The complainant further told the court that her brother would also do it and tell her that he would but an upper bed. The respondent submits that the trial court came to the right conclusion that it was the appellant who defiled the victim.

12. The respondent submits that from the evidence that was adduced at trial, it is clear that the appellant is the person who defiled the victim and there was no possibility of mistaken identity.

13. The respondent submits that all the prosecution witnesses were consistent and corroborated each other. PW2 the complainant's teacher noticed that the complainant had been defiled and took the necessary steps. Further, PW7 the clinical officer examined the complainant and confirmed that indeed she was defiled. The respondent submits that Section 124 of the *Evidence Act* allows the testimony of the complainant in sexual offence cases and needs no corroboration. Furthermore, the trial court gave reasons that it was satisfied that the complainant was telling the truth and she appeared to be very mindful of her father and would not have implicated him by lying to the court.

14. The respondent relies on the cases of Abdalla v Republic KECA 1054 [KLR] and Supreme Court Petition No. E108 of 2023 Republic v Joshua Gichuki Mwangi and submits that the sentence was lenient albeit legal and in line with Section 8[2] of the *Sexual Offences Act*. The respondent urges the court to enhance the sentence of forty years to life imprisonment as prayed for in its notice of enhancement of sentence dated 27th March 2025. The respondent refers to the recent Supreme Court decisions in Petition No. E002 of 2024 Republic v Evans Nyamari Ayako and Petition No. E013 of 2024 Republic v Julius Kitsao Manyeso and submits that life imprisonment under Section 8[2] of the *Sexual offences Act* is legal and not in contravention of *the Constitution* in defilement cases.

Issues for determination

15. The appellant has cited 6 grounds of appeal which can be compressed into two main issues:-

    a. Whether the prosecution proved its case beyond any reasonable doubt;

b. Whether the sentence meted out against the appellant is justified.

The Law

16. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

17. Similarly in the case of Okeno v Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya v Republic [1957] EA 336] and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. [Shantilal M. Ruwala v R [1957] EA 570]. 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 finding 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, see Peters v Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another v Republic [2005] KLR 174.

Whether the prosecution proved its case beyond any reasonable doubt

18. In order to establish whether the prosecution proved its case beyond a reasonable doubt I shall address the following issues as raised by the appellant:

a. Whether there was conclusive evidence of all the ingredients of defilement;

b. Whether the prosecution case was filled with contradictions and inconsistencies;

c. Whether the trial court considered the defence evidence.

Whether there was conclusive evidence of all the ingredients of defilement.

19. Relying on the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 where it was stated that:- "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

20. On the age of the victim, the court of Appeal in Edwin Nyambogo Onsongo v Republic [2016] eKLR, the court stated as follows in respect of proving the age of the victim in cases of defilement:

> " ....the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism

card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

21. PW1 testified that she was 6 years old and PW6, the investigating officer testified that the minor was born on 2nd May 2018 and was six years old at the time ofinvestigations. The investigating officer produced the minor's birth certificate as an exhibit. I have perused the birth certificate which indicated that the minor was born on 2nd May 2018. Therefore in May 2022 and March 2023, when the offence occurred, the minor was four years old and eight months and therefore a child of tender years. It is therefore my considered view that the prosecution proved the age of the minor.

22. Section 2[1] of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

23. On the element of penetration, PW1 testified that her mother left after her father, the appellant beat her. The minor testified that her father used to go at night and pick her and tell her to sleep on him. She further testified that the appellant used to remove his clothes and inserts his "kanyonyo" in her "kanyonyo". To illustrate this PW1 pointed to her vagina. PW2, the clash teacher of the minor testified that on 14th March 2023 during break time the minor went and sat next to her and started singing the private parts songs and she appeared emotional as she sang the song. Upon PW2 inquiring whether anyone had ever touched her private parts, the minor looked down and did not respond. The witness then testified that the minor then told her that the appellant used to touch her "kanyonyo". pointing at her vagina. The minor further told her that the appellant used to remove his "kasusu" and insert it in her "kasusu" and then wipe her. she further stated that the minor's brother used to do the same thing to her and she would experience a lot of pain.

24. George Kimani, a clinical officer at Igegania Hospital, PW7 testified that he examined the minor and filled in the Post Care Rape Form and P3 Form on 16th March 2023. The clinical officer testified upon examining the minor she had redness on the labia minora and on the vagina opening and was tender on touch, painful. The clinical officer further testified that the vagina orifice was tender and she had pus cells. There was no presence of spermatozoa and the hymen was absent. The witness concluded that the minor had been defiled more than once. PW7 produced the Post Rape Care Form, the P3 Form and treatment notes as exhibits.

25. To prove penetration, the key evidence relied on by courts in a defilement matter is the complainant's testimony which is usually corroborated by the medical evidence produced by the medical officer. Thus the evidence of PW1 is corroborated by the medical evidence produced by PW7. The witness, PW7 pointed out that the examination done on PW1 revealed that her hymen was broken which indicated that penetration of the penile had occurred. Thus the inevitable conclusion from the analysis of the evidence is that there is ample evidence to prove that penetration did occur.

26. The appellant argues that the absence of spermatozoa indicates that he did not defile the minor and furthermore the prosecution did not prove penile penetration as such, this element was not proved to

the required degree. On the issue of absence of spermatozoa, the Court of Appeal in the case of Mark Muiruri Mose v Republic [2013] eKLR stated as follows:-

> " Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed.

27. Thus it is evident that the presence of spermatozoa in the vagina is not legal requirement so long as penetration is proved. Penetration herein was adequately proved through the evidence of PW1 and PW7.

28. On the issue of identification, PW1 testified that the appellant was her father. The appellant testified in his defence that the minor was his daughter and that his wife left him with the three children who he solely provided for. Thus the appellant was well known to the complainant. This was a case of recognition and not simple identification. I have perused the court record and noted that the testimony of PW1, PW2 and PW3 identifies the appellant as the perpetrator. Furthermore, the appellant has admitted in his own evidence that PW1 is his child. It is thus my considered view that the appellant was positively identified as the perpetrator. As such, I accordingly find that the prosecution did prove the element of identification.

29. The appellant has complained that the medical evidence did not implicate him and no tests were carried out which were necessary. As the Court of Appeal noted in Geoffrey Kioji v Republic Nyeri Criminal Appeal No. 270 of 2010 [UR]:-

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to Section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

30. The appellant further argues that the prosecution's case was filled with material inconsistencies and contradictions thus causing doubt on the alleged offence. Relying on the case in the Court of Appeal Tanzania of Dickson Elia Nsamba Shapwata & Another v The Republic Cr App. No. 92 of 2007, addressed the issue of discrepancies in evidence and concluded as follows:-

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

31. The appellant argues that the testimony of PW1 is contradictory as she stated that the appellant and her brother committed the acts yet no corroborative evidence was presented to substantiate his involvement. Further that PW2's account of the victim's statement was inconsistent with PW1's testimony regarding the details of the alleged acts. Additionally, PW5 admitted uncertainty about the number of people in the house during the appellant's arrest raising doubts about the reliability of the arrest procedure and subsequent investigation.

32. From the record, it is clear that the complainant gave a consistent testimony of how the appellant used to defile her by inserting his "kanyonyo" into her "kanyonyo" and she would feel pain. The minor testified that she told her class teacher, PW2 that the appellant used to defile her after she sang the private parts song. The medical evidence further corroborates the evidence of PW1 as the clinical officer concluded that the minor had been defiled more than once as her hymen was broken. The allegations by the appellant on the inconsistencies do not go to the root of the matter. The complainant was very consistent in giving her evidence as to how the appellant defiled her and describing the occurrence in detail. The record shows that the complainant's testimony was cogent, consistent and was not shaken during cross examination.

33. The appellant further submits that the trial court did not consider his defence. The appellant on cross examination testified that his son had told him that the victim had gone with the teacher but he did not find any reason to go and look for her. The appellant further testified that his wife left home in April 2022 and he lived with the victim as the only parent for a period of one [1] year before the incident. He further stated that someone could have told PW1 what to say so as to implicate him. The appellant further testified that he suspected that the teacher implicated him but was not sure. The appellant stated that the victims could have been injured as she played with the other children with the ball.

34. I have perused the court record and noted that the trial magistrate in her judgment considered the appellant's defence and said that the defence was not substantiated as the evidence of PW2 explained clearly in her evidence how she noticed that PW1 was an abused minor. She then went ahead to interview the child in the presence f her fellow teacher. PW1 opened up and narrated the sad story of what her father had been doing to her for a long period during the absence of her mother. It is at that juncture that the matter ws handed over to the police through the local children's officer. As such, the appellant's denial defence did not shake the prosecution's case which was in my view, airtight.

35. It is therefore my considered view that the trial court did consider the defence adequately and found that it did not displace the evidence by the prosecution witnesses. It is my further considered view that in support of the trial court's findings, PW1 gave a very comprehensive testimony of what happened and that her evidence was consistent and cogent. As such, it is my considered view that the defence evidence albeit being considered was not sufficient to displace the prosecution evidence. Accordingly, I opine that the prosecution proved its case beyond reasonable doubt.

Whether the sentence is harsh and excessive

36. The Court of Appeal, on its part in Bernard Kimani Gacheru v Republic [2002] eKLR restated that:-

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence, unless that sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

36. Section 8[2] of the *Sexual Offences Act* No. 3 of 2006 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."

36. The Supreme Court decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa [ISLA] & 3 Others [Amicus Curiae] [Petition E018 of 2023] [2024] KESC 34 [KLR] [12 July 2024] [Judgment] held that:-

> " Mandatory sentences left the trial court with absolutely no discretion such that upon conviction, the singular sentence was already prescribed by law. Minimum sentences however set the floor rather than the ceiling with regards to sentences. What was prescribed was the least severe sentence a court could issue, leaving it open to the discretion of the courts to impose a harsher sentence.
>
> The judgment of the Court of Appeal delivered on October 7, 2022 was one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remained lawful as long as Section 8 of the *Sexual Offences Act* remained valid. The court of Appeal had no jurisdiction to interfere with that sentence."

36. The respondent has filed a Notice of Enhancement of Sentence praying the sentence be enhanced to life imprisonment. Taking into consideration the nature and circumstances of the offence, the mitigation given by the appellant and the ramifications of the appellant's actions on the child's future, it is my considered opinion that the sentence of forty years ought to be enhanced to life imprisonment. The appellant was a father to the victim and he was supposed to protect her as a parent against harm yet he is the one who was inflicting harm on her.

36. I regard to enhancement of sentence, this court relies on the recent Supreme Court petitions whereas the court held that the sentence for defilement shall be in accordance with Section 8 of the Act which provides for life imprisonment. These are the petitions of Republic v Evans Nyamari and that of Julius Kitsao Manyeso.

36. It is also important to consider that the complainant was a minor aged between 5 – 6 years at the tie of commission of the offence. At that tender age, she was left seriously traumatised and her life messed up by her own care giver.

36. It is therefore my finding that sentence should be enhanced to life imprisonment.

36. Consequently, the conviction is upheld. The appellant shall serve life imprisonment. The sentence imposed by the trial court is hereby quashed.

36. I find this appeal has no merit and my view and it is hereby dismissed.

36. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3RD DAY OF JULY 2025.

F. MUCHEMI.

JUDGE