



REPUBLIC OF KENYA



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**JMM v Republic (Criminal Appeal E066 of 2023)
[2025] KEHC 12546 (KLR) (9 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12546 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E066 OF 2023
RC RUTTO, J
SEPTEMBER 9, 2025**

BETWEEN

JMM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence delivered by Hon.
E.K. Suter, Principal Magistrate on 18th and 29th September 2023 in
Mavoko Criminal S.O No. E052 of 2022 at the Mavoko Law Courts)*

JUDGMENT

1. The Appellant being dissatisfied by the decision of the trial court that convicted and sentenced him for the offence of defilement contrary to Section 8[1] as read with section 8[2] of the [Sexual Offences Act](#) No. 3 of 2006, has lodged this appeal.
2. The appeal is premised on the amended grounds of appeal as follows; that the learned Trial Magistrate erred in law and fact by;
 - a. Relying on evidence of PW1 whose credibility and truthfulness was questionable hence cannot be cured by section 124 of the [Evidence Act](#).
 - b. By failing to find that the elements of the offence of sexual assault [identification] was not proved beyond reasonable doubt as required by law.
 - c. Failing to consider that the life sentence imposed was unconstitutional due to its mandatory nature.
 - d. By imposing a life sentence upon a 72 year old man without considering the principles of proportionality, individual circumstances and the emerging jurisprudence on sentencing of elderly offenders, thereby rendering the sentence unconstitutional, inhumane and excessive



Background

3. The Appellant was charged with the offence of defilement contrary to Section 8[1] of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on diverse dates between 5th September 2022 and 15th September 2022 in the early hours of the morning at [Particulars Withheld] Village of Mavoko Sub County within Machakos County, he intentionally caused his penis to penetrate the vagina of one LN, having knowledge that the said LN was a girl aged 8 years.
4. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11[1] of the [Sexual Offences Act](#). The particulars were that on diverse dates between 5th September 2022 and 15th September 2022 in the early hours of the morning at [Particulars Withheld] Village of Mavoko Sub County within Machakos County, he intentionally and unlawfully touched the vagina of one LN having knowledge that the said LN was a girl aged 8 years.
5. The Appellant pleaded not guilty and the trial commenced with the prosecution calling five [5] witnesses and the defence calling two [2] witnesses.

Case before the Trial Court

6. Upon conducting voir dire examination, the trial court directed PW1, LN to give sworn testimony. She stated that she was in class three. That she knew the Appellant has his grandfather. That the Appellant inserted his 'chukuu' to hers [the learned magistrate observed that she touched her vagina]. That he was lying on her in his bedroom with grandmother. That he did it twice on Monday and on Tuesday. That the grandmother had gone to milk the cow. She stated that she did not tell anyone on the first day but on the second day she told teacher L. That the Appellant did not touch but inserted his penis, he told her to remove her clothes and sleep, he then slept on her and inserted his penis. He did not take too long and by the time shosho arrived, he had finished. PW1 further stated that she was taken to hospital by Teacher L and Teacher C. On cross examination she reiterated that the Appellant did 'tabia mbaya' on her. That Alphonse did 'tabia mbaya' the first time and that Alphonse did not do it again.
7. PW2, LAO stated that she was giving exams in grade 3 when E, a grade 2 went and told her that PW1 had told her that she used to do bad manners. She called PW1 who then told her that in the morning they did tabia mbaya with the grandfather. That the grandfather inserted his penis in the child. The child repeated the narration before the guidance and counseling teacher: that the grandfather calls her to the bed while the grandmother milks cow and defiles her.
8. PW2 stated that PW1 was also reported of having tabia mbaya with other students behind the class. That when asked where she learnt it, she said from her grandfather. She was asked to bring her parents. The grandparents attended school and were informed of the incident. The grandmother said she had never heard of the incident. That the minor was then taken to hospital and a report made to the police.
9. PW3, CN stated that she was a teacher. That PW2 came with the minor who when asked to tell what had happened stated that she had been defiled by her grandfather by inserting his penis in her vagina. That it happened in the morning when the grandmother went to milk the cows. The grandparents were then invited to school and were informed, the minor was taken to hospital and a report made to the police station. PW3 identified the Appellant as the grandfather.
10. PW4, Dr. John Mutunga stated that he examined PW1 on allegations of defilement that had happened on 5th to 15th September 2022. On examination, she did not have physical injury on the genital area, the outer genitalia was normal, the hymen was broken but the same was not fresh. She had injury on the lacerations around the vagina walls. She was having discharge that was white in colour. Lab tests



on the high vaginal swabs showed pus cells and she was treated under UTI. He produced the P3 form as Exhibit 1; PRC form as Exhibit 2; lab results as Exhibit 3 and treatment sheets as Exhibit 4. On cross examination he stated that lacerations could not be caused by UTI but a blunt object only and pus cells shows there was exposure to sexual act.

11. PW5, PC Margaret Mbaluka stated that she took over the investigations from Corporal Laban Mohamed who had resigned. She produced the child's birth certificate as exhibit 5 to confirm that the child was 8 years old. She stated that the child was taken to hospital and it was confirmed that she had been defiled. The child narrated the ordeal before the teachers and later before the teachers and the grandparents. The child was then taken to Kyuni Health Center and the incident reported at Kyuni Police. The child was interrogated at the station and she confirmed. The Appellant was then arrested.
12. Upon considering the prosecution evidence, the trial court found that the prosecution had established a prima facie case and placed the Appellant on his defence. The Appellant gave sworn statement and called his witnesses.
13. DW1, JMM, the Appellant, stated that he was framed. That during the period he was no available as he used to go and look for pasture for cattle and also milk the cows as his wife would prepare the complainant. That the minor said she was sent home since she was beaten and told that she looked like him. He took the child back to school only to be told that the issues will be addressed in the presence of his wife. That he called the wife who then came to school. They were then told that the minor was seen playing with other kids, sleeping on each other and that he was the one who had taught her 'cha baba' and 'cha mama' and used to do it when his wife was milking. He stated that when the wife milks he holds the calf. Further that before the incident he was a class representative and he found that children were being sent home despite paying fees. That he raised this issue and it was noted that there was a record of collecting but not submitting. That it is not true and his age could not allow him to do such a thing. On cross examination he stated that they had 2 cows and he used to go to cut grass as the wife milks.
14. DW2, AMM stated that the Appellant was his neighbour and the grandchild lived with them since she was very young and would be taken to school together with his kid. That they used to go to Sunday school with the child and she was a happy and very active child. He also stated that their kids like playing 'cha mama' and 'cha baba' and they actually commit sexual acts. That he had dealt with two such occasions in the past month. It was his evidence that he could not tell whether or not the child had been defiled by his grandfather.
15. PW3 HMM stated that the Appellant was his neighbour and he has never heard any issues except the case before court.
16. Upon evaluation of the entire evidence on record, the trial court delivered its judgment on 29th August 2023, wherein it found the Appellant guilty, convicted him and sentenced him to life imprisonment.

The Appeal

17. The Appeal was canvassed by way of written submissions. The Appellant's submissions were dated 4th April 2025, while the Respondent's submissions were dated 28th February 2025.
18. The Appellant set out the background of the case and urged the court to rely on the amended grounds of appeal. It was his submission that the credibility of the complainant, PW1 was questionable as her evidence was marred with contradictions and inconsistencies that undermined the reliability on her account and this went to the core element of the offence of defilement, namely identification. That PW1 gave conflicting testimonies on whether she knew E and E, that on one hand she knew them



and on another, she stated that she did not know them. To the Appellant, PW1's testimony was not credible and must have concealed more information.

19. It was also stated that PW1 was never questioned by her teachers regarding 'cha baba' yet PW2 testified that she called PW1 into her office along with the counselor and questioned her about the 'cha baba' that she allegedly engaged with other children. It was submitted that this was contradictory and ought to have been considered and resolved in favour of the Appellant. Further, that PW1 did not disclose to anyone that she had been defiled by another boy named Alphonse until during cross examination. The Appellant thus urged that PW1 testimony regarding being defiled by her grandfather could not be deemed entirely truthful and credible. The Appellant relied on a number of cases to support his case, namely; *Mataya Kodi v Republic* [2011] eKLR, *MTG v Republic* [2022] KEHC 189 [KLR], *Richard Munene v Republic* [2018] eKLR, *DON v Republic* [2022] KECA 120 [KLR], *John Mutua Munyoki v Republic* [2017] eKLR, *Ndungu Kimanyi v Republic* [1979] KLR 283 and *Chinja v Republic* [2025] KEHC 1744 [KLR].
20. The Appellant urged the Court not to rely on section 124 of the *Evidence Act* and find that there was need for corroboration by independent witness since there was doubt in the victim's identification.
21. Secondly, it was submitted that the elements of defilement were not proven beyond reasonable doubt. In support of this contention, reliance was placed on the case of *Charles Wamukonya Karani v Republic*, Criminal Appeal No 72 of 2013 and *Kariuki Njiru & 7 others v Republic* 6 of 2001.
22. Thirdly, while relying on the cases of *Manyeso v Republic* [2023] KECA 709 [KLR], *Ali AbdallaMwanza v Republic* [2018] eKLR and *Evans Nyamaria Ayako*, Criminal Appeal No 22 of 2018, it was submitted that the sentence was harsh considering that at the time of sentencing, the Appellant was 70 years old. He contended that this meant that he will not make it to reintegrate back to the society. The Court was urged to substitute the life sentence with a fixed term sentence that reflects the principles of justice fairness and human dignity
23. The learned Prosecution Counsel, for the Respondent, in submissions dated 28th February 2025 submitted the Appellant had not pointed out the exact manner in which the charge sheet was defective; that the charge sheet passed the requisite test under section 134 of the Criminal Procedure Code. It was submitted that it was clear that the victim was a granddaughter of the Appellant and therefore incest would have been preferred in place of defilement. That the sentence would still be life imprisonment since the victim was less than 18 years at the time of assault. That the Trial Magistrate considered the relationship during sentencing and found the same to be an aggravating factor.
24. It was submitted that the Appellant failed to indicate which particular evidence was illegally obtained and the specific law contravened. Further, that the judgment took into account all the evidence that was tendered by the prosecution and the defence.
25. On failure to call crucial witnesses, reliance was placed on the case of *Richard Munene v Republic* [2018] eKLR. It was submitted that the other persons mentioned were not called as they were schoolmates of the complainant and equally of tender years and bearing in mind the unfortunate circumstances of the case, it would not be in their best interest. Further that failure to call them did not weaken the prosecution case as the accounts by the witnesses were sufficient in proving the case.
26. While relying on the Supreme Court decision in *Petition No E008 of 2023, R v Joshua Gichuki Mwangi, ISLA & 3 others* [2024] eKLR, it was submitted that the sentence of life imprisonment was legal and the Trial court was bound by the principle of stare decisis. The Court was urged to dismiss the appeal.



27. This Court observes that the Respondent's submissions were based on the original grounds of appeal as set out in the petition of appeal, rather than the amended grounds of appeal as articulated in the Appellant's written submissions. As a result, the Respondent's submissions do not directly address the issues currently before the Court and are therefore of limited relevance to the determination of the appeal.

Analysis and Determination

28. This being a first appeal, this Court has a duty to re-consider and re-evaluate the evidence adduced before the trial court and make its own independent conclusions. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. [See the cases of *Pandya v R* {1957} EA 336; *Ruwalla v R* {1957} EA 570 and *Kisumu Criminal Appeal No. 28 of 2009, David Njuguna Wairimu v. Republic* [2010] eKLR]

29. Upon considering the Trial Court record, the memorandum of appeal and the submissions on record the issues arising for determination are;

- a. Whether the offence of defilement was proved
- b. Whether the sentence should be reduced

30. The appellant was charged with the offence of defilement contrary to Section 8 [1] as read with Section 8 [2] of the *Sexual Offences Act* which provides that:

“[1] A person who commits an act which causes penetration with a child is guilty of an offence termed defilement

[2] 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.”

31. In the case of *George Opondo Olunga v Republic* [2016] eKLR the ingredients for the offence of defilement were set out as: proof of the age of the victim; Proof of penetration or indecent act; and Identification of the perpetrator.

32. Looking into the three grounds, the first one is the age of the complainant. The Court of Appeal in *Malindi in Mwalengo Chichoro Mwajembe v Republic*, Msa. App. No. 24 of 2015 [UR]/Edwin Nyambogo Onsongo v Republic [2016] eKLR held as follows: -

“.....the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense.”

33. In this matter, the charge sheet indicated that the minor was 8 years. During voir dire examination the minor stated that she was 8 years old. According to PW4, the Doctor who examined the victim, at the time of the incident, the victim was 8 years old and this is corroborated by the birth certificate produced by PW5 that indicates the date of birth is 15th March, 2014. The incident is said to have occurred on diverse dated between 5th September 2022 and 15th September 2022, meaning that she was 8 years old at the time of the alleged incident as prescribed in section 8[2] of the Act. I find that



the ingredient of age was sufficiently proven. It is worth-noting that in fact the age of the minor is not contested in this appeal.

34. The second element is penetration. From the record, the victim stated as follows;
- “ He inserted his chukuu to mine...[touches her vagina]. He used his kachuchu [touching her private parts generally]. He was lying on me on his bedroom with grandmother. He then removed his Kachuchu. He did it twice on a Monday and then again on a Tuesday.....he did not touch but inserted his penis. He told me to remove my clothes and he removed his clothes and then he told me to sleep and then he slept on me and inserted his penis.”
35. This evidence has been corroborated by the medical evidence that was produced by PW4, the medical officer who produced the P3 form, PRC form, the laboratory results and treatment notes. He told the court that during examination, he noted that the victim did not have physical injury. On the genitalia, the same was normal, the hymen was broken but the same was not fresh. She had injury on the laceration around the vaginal walls. That there was a discharge that was white in colour. He confirmed that the urine had puss cells.
36. I have no doubt in my mind that the minor was defiled and this was proven beyond reasonable doubt. Notably again, the issue of penetration is not contested in this appeal. Far from it, in fact it was alleged by one of the Appellant’s witnesses that PW1 was ‘engaged’ in ‘ka baba’ and ‘ka mama’ with his children. Hence the second element was proved.
37. The third essential ingredient is positive identification of the assailant. PW1, unequivocally identified the Appellant as her grandfather, a person with whom she had been living with. This relationship was not disputed infact, the Appellant himself confirmed that the victim was his granddaughter. Furthermore, all the Appellant’s witnesses corroborated this connection and confirmed that the two lived together.
38. This court finds that the identification of the Appellant was by recognition which is considered more reliable since the parties are familiar with each other. Given the above I find that the minor positively identified the appellant.
39. Notably, the minor also mentioned that one Alphonse had previously committed tabia mbaya against her. The Appellant seeks to discredit her testimony by suggesting confusion in identifying the perpetrator. However, the court finds that the complainant was clear and consistent in distinguishing between the two incidents. She stated that both Alphonse and the Appellant committed tabia mbaya on separate occasions. The incident before the court involves the Appellant who was well known to the minor.
40. Further, submitting on the question of identification, the Appellant urged that the victim could not identify Esther or E. Outrightly, this submission is without merit. In proving defilement, in issue is usually the identity of the perpetrator and not any other third party. The victim having identified the perpetrator as the Appellant, her positive identification cannot be impugned by reason of alleged failure to identify Esther and E.
41. Lastly, it was also urged that her testimony on identification could not be relied on under section 124 of the *Evidence Act* as she was not a reliable witness. I have looked at the record, PW1 was taken through a voire dire and she gave sworn testimony. She was cross-examined and at no time did the trial court, which had the opportunity to see her testimony, adjudge her as being untruthful or not credible. A finding of lack of credibility cannot be made at this appellate court without any material facts. Hence this ground is dismissed. PW1 testimony was well admitted by the trial court.



- 42. Accordingly, this Court is satisfied that the complainant positively identified the Appellant through recognition. The Appellant in fact contradicts himself when himself and the witnesses confirm that the victim was his grandchild then proceeds to cast aspersions that he was not well identified.
- 43. As regards the sentence, the Appellant was sentenced to serve life imprisonment. The issue of sentences was settled by 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].
- 44. In this case, section 8 [2] of the *Sexual Offences Act* provides for a life imprisonment where one is found to be guilty of defilement of a child aged eleven years or less. Taking into account the circumstances of the case, the sentence is upheld. The Appellant has not given this Court any legitimate and legal reason to interfere with the sentence meted out by the Trial Court. The same was within the law.
- 45. The upshot is that, the Appeal is dismissed.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF SEPTEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

