



REPUBLIC OF KENYA



**YWM v Republic (Criminal Appeal 5 of 2023)  
[2024] KEHC 16937 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 16937 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KWALE  
CRIMINAL APPEAL 5 OF 2023  
F WANGARI, J  
MARCH 15, 2024**

**BETWEEN**

**YWM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arises from the Judgement of the Trial Court, Hon. Joy Mutimba, Resident Magistrate in Msambweni SRMCSO No. E081 of 2021 dated 25th January 2023)*

**JUDGMENT**

1. This Appeal arises from the Judgement of the Trial Court, Hon. Joy Mutimba, Resident Magistrate in Msambweni SRMCSO No. E081 of 2021 dated 25<sup>th</sup> January 2023.
2. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006.
3. The particulars of the first and second counts were respectively that on 1<sup>st</sup> July to 16<sup>th</sup> November 2021 in Lungalunga Location of Kwale County intentionally and unlawfully caused your penis to penetrate the vagina of TW, a child aged 10 years.
4. The second charge was deliberate transmission of HIV contrary to section 26(1)(a) of the *Sexual Offences Act*, 2006. The particulars thereof were that on diverse dates on 1<sup>st</sup> July to 16<sup>th</sup> November 2021, in Lungalunga Location of Kwale County, having knowledge that he was infected with HIV, intentionally had unprotected sex with TW which infected the said TW with HIV.
5. The Accused person was arraigned and he denied the charges. A plea of not guilty was consequently recorded.



6. The Trial Court considered the case and rendered the Judgement on 25<sup>th</sup> January 2023. The Court found the Appellant guilty and convicted him of the offence. The Appellant was also sentenced to life imprisonment on both counts with the sentence on the second count held in abeyance.
7. The Appellant, aggrieved, lodged this Appeal.
8. The Appellant preferred 5 grounds. The grounds seek to challenge conviction and sentence on the ground that the evidence tendered by the prosecution did not prove the case against the Appellant beyond reasonable doubt and the trial court erred in convicting the Appellant on the offence.

### **Evidence**

9. At trial, PW1, the minor testified that she was 11 years old. She told the court that she was in Grade 5.
10. It was her case that the Appellant was a watchman in the school next to her mother's house, [Particulars Withheld] Academy, and was well known to her. She further testified that he called the complainant and her 3 friends into a classroom and demanded that they remove their underwear. He then removed his shorts and inserted his penis into the complainant's genitalia. That he did so one by one to all but apart from the complainant, the others had not reported the matter. She also testified that she was HIV positive.
11. On cross examination, it was her case that the mothers of the other 3 girls refused them to testify. That the Appellant called her to sweep, gave her Kshs. 30 and defiled her.
12. PW2 was the Complainant's mother. She testified that in July 2021, the complainant refused to go to school. That she looked for the complainant and found her at the Appellant's home.
13. PW3 was the Clinical Officer. He confirmed that there were bruises to the labia minor with no discharge. That the complainant was HIV Positive. Further, it was his testimony that as at 8<sup>th</sup> July 2021, the Appellant was HIV Negative on testing but subsequently in November 2021, he was HIV Positive and by then on ARVs. That it takes a while to show HIV Positive status.
14. PW4 testified that he was the Investigating Officer. He testified that the results of the investigations pointed to the Appellant as offender and they arrested him.
15. The Appellant did not testify or call any witness.

### **Submissions**

16. Directions were given for parties to file submissions. The Appellant filed submissions on 22<sup>nd</sup> January 2024. The Appellant started by submitting that the sentence of life imprisonment meted on him was unjustified. He submitted and relied on the case of Julius Kisau Manyeso v R [2021] eKLR that life sentence was tantamount to discrimination as it did not permit mitigation for a lesser sentence.
17. The submissions by the Appellant entirely sought to demonstrate that the sentence was not proper. The Appellant did not submit on conviction.
18. On the part of the Respondent, they filed submissions on 22<sup>nd</sup> January 2024. It was submitted that the court correctly found that the prosecution had proved its case as against the Appellant beyond reasonable doubt. Reliance was placed on the case of George Opondo Olunga v R [2016] eKLR to canvass the point that all the ingredients of age, penetration and identification as well as infection with HIV were proved beyond reasonable doubt.



19. It was further submitted that the sentence was proper and meted as per the Sentencing Guidelines and the case of Francis Karioko Muruatetu & Another v R and Others [2021] eKLR where the extend of the injuries, victim's age and effect were well considered by the Trial Court.
20. I was urged to dismiss the Appeal.

### **Analysis**

21. I have perused the record of proceedings and evidence in the Trial Court as well as the filed submissions. The issue is whether the Trial Court erred in convicting and sentencing the Appellant as she did.
22. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.”

23. In the case of *Mbogo and Another v Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

24. I note that the complainant testified that she was a minor aged 10 at the time of the alleged defilement. The Complainant identified the Appellant by recognition. The prosecution also proved both vaginal and anal penetration to the required standard.

25. It was held by the Court of Appeal in *Moses Nato Raphael v Republic* [2015] eKLR as follow;

“What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 where he stated:-

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”



26. On my reevaluation, I am in congruence with the finding of the Trial Court that the intentional and unlawful penetration was proved and the Appellant was the person who caused the said penetration, hence the offence. The evidence of PW3, the clinical officer confirmed the unlawful act.
27. Similarly, it was proved that the Appellant was HIV Positive and evidence was clear that he infected the Complainant during the unlawful act of defilement. I consequently have no reason to interfere with the finding of the Trial Court on conviction.
28. On sentence, the Trial Court imprisoned the Appellant to life imprisonment in Count 1. In Count 2, he was sentenced to life imprisonment but since one cannot be sentenced to life twice, the sentence in Count 2 was held in abeyance.
29. In any case the sentence should be proportional. The Court of Appeal in the case of *Thomas Mwambu Wenyi v Republic* [2017] eKLR stated as follows: -
- “A sentence imposed on an accused person must be commensurate with the blame worthiness of the offender and hat the court should look at the facts and circumstances of the case in its entirety before settling for any given sentence”.
30. I am also alive to the Sentencing Guidelines. The Supreme Court has propounded them in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR. The following are guidelines with regard to mitigating factors before sentencing.
- (a) age of the offender;
  - (b) being a first offender;
  - (c) whether the offender pleaded guilty;
  - (d) character and record of the offender;
  - (e) commission of the offence in response to gender-based violence;
  - (f) remorsefulness of the offender;
  - (g) the possibility of reform and social re-adaptation of the offender;
  - (h) any other factor that the Court considers relevant
31. Section 26 of the *Sexual Offences Act* under which count 2 was drawn is in the following terms:-
- “26. Any person who, having actual knowledge that he or she is infected with
- (1) HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything or permits the doing of anything which he or she knows or ought to reasonably know –
    - (a) Will infect another person with HIV or any other life threatening sexually transmitted disease shall be guilty of an offence whether or he or she is married to that other person and shall be liable upon conviction to imprisonment to a term of not less than 15 years but which may be for life imprisonment.”



reasonable doubt. The court meted out the sentence of life imprisonment both for unlawful defilement and for unlawful infection of the complainant with HIV.

33. I am well guided that the Trial Court was not wrong in imposing a custodial sentence. However, the sentence of life imprisonment for both counts were in my view excessive. The offences arose out of the same transaction. I reduce the sentence in the first count from life imprisonment to 30 years and the sentence in the second count from life imprisonment to 15 years imprisonment.

34. In the circumstances, I make the following Orders:

- i. The Appeal on conviction is dismissed.
- ii. The sentence of life imprisonment on the first count is set aside and replaced with 30 years' imprisonment.
- iii. The sentence of life imprisonment years on the second count is set aside and replaced with 15 years' imprisonment.
- iv. The sentences shall run concurrently taking into account the time spent in remand.
- v. Right of Appeal 14 days.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 15<sup>TH</sup> DAY OF MARCH, 2024.**

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**F. WANGARI**

**JUDGE**

In the presence of: -

M/S Mwaura S.C for the State

Appellant p.i.p

Barile, Court Assistant

