



**DMM v Republic (Criminal Appeal E036 of 2022)  
[2023] KEHC 18468 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 18468 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CRIMINAL APPEAL E036 OF 2022  
MS SHARIFF, J  
MARCH 20, 2023**

**BETWEEN**

**DMM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the original conviction and in Sexual Offences No E008 of 2020 in the Chief Magistrate's Court at Chuka delivered on 13th April 2022 by Hon. Njoki Kabara, SRM)*

**JUDGMENT**

**A. Case Background**

1. The appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006. He was sentenced to serve the minimum mandatory custodial sentence of 15 years.
2. Particulars of the offence were that on the April 24, 2020 at Muriokomaingi village the appellant unlawfully and intentionally caused his penis to penetrate the vagina of P K a child aged 17 years.

**B. Appeal**

3. The appellant has lodged this appeal wherein he is beseeching this court to set aside the sentence of 15 years and discharge him unconditionally on grounds that the victim is his wife with whom he has sired two children. The appellant implores this court to allow him go and raise his family.
4. The appeal is resisted by the State which maintains that the victim had no legal capacity to marry at all material times.



## B. Analysis and Determination

5. As a first appellate court, I am enjoined to re-evaluate, analyze and scrutinize the evidence afresh and make my own conclusion while taking into account that unlike the trial court, I do have the advantage of seeing and hearing the witnesses first hand. (See *Okeno v Republic* (1972) EA 32, *Pandya v Republic* (1975) EA 336 and *Shantial M. Ruwal v Republic* (1957) EA 570.
6. I have re-evaluated, re-analyzed and scrutinized the evidence and I find that the victim had been subjected to domestic violence at her home by the brother one HM wherefore she ran away from home and took refuge in the appellant's house given that they were already in a romantic relationship.
7. Presently the victim is a single parent of two children whilst her co-parent, the appellant is serving his sentence.
8. Whereas I do appreciate that the victim did not have the legal capacity to marry at the age of 17 years, I do find that the appellant's case falls under the provisions of section 8(5) of the *Sexual Offences Act* No 3 of 2006. I am also guided by the Court of Appeal case of *Eliud Waweru v Republic* (2019) eKLR where the court stated that:-

“We think also that it stands to reason that a person is more likely to be deceived into believing a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, the closer to 18 years the child is, the more likely the deception and the more likely the belief that he or she is over the age of 18 years.”

9. The Court of Appeal went on to quote the English case of *Gillick v West Norfolk & Wisbeach Area Health Authority* (1985) 3 All ER thus:-

“If the law should impose on the process of growing up fixed limits where nature knows only a continuous process, the price would be artificial and a lack of realism in an area where the law must be sensitive to human development and social change.”

10. In the same case the judges of the Court of Appeal observed that:-

“A candid natural conversation on this sensitive yet important issue implicating the challenges of maturity, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having sexual intercourse with adolescent girls whose consent has been held immaterial because they were 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation.”

## Conclusion

11. Upon re-evaluating, re-analyzing and scrutinizing the evidence in totality I am persuaded that the circumstances of this case merit a reconsideration of the sentence. The victim herein who is now an adult is bearing the brunt of raising two children as a single parent whilst the appellant is serving sentence.

## Orders:-

1. I do hereby set aside the sentence. The appellant is hereby set free unless otherwise lawfully held on conditions that:



- i. he reports to the Probation Officer, Chuka, on the first Tuesday of every month for a period of one (1) year.
  - ii. he maintains the victim and their two children
2. The Probation Officer and the Children Officer Chuka to each submit to this court a report on the appellant's compliance status within 90 days from the date hereof.

It is hereby so ordered.

**Dated, signed and delivered at Chuka this 20<sup>th</sup> day of March 2023**

**MWANAISHA S. SHARIFF**

**JUDGE**

