



REPUBLIC OF KENYA



**KENYA LAW**  
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**PWM v Republic (Criminal Appeal 73 of 2019)  
[2023] KEHC 1528 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1528 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL 73 OF 2019  
HK CHEMITEI, J  
MARCH 1, 2023**

**BETWEEN**

**PWM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgement of Hon. Y. Khatambi  
(SRM) dated 10th October 2019 in Criminal Case No. 66 of 2013)*

**JUDGMENT**

1. The appellant was charged with the offence of Defilement contrary to Section 8(1) (2) of the [Sexual Offences Act](#) no 3 of 2006. The particulars of the charge were that on the 23<sup>rd</sup> day of April 2013 in Nakuru district within rift valley province intentionally and unlawfully committed an act by inserting your male genital organ namely penis into female genital organ namely vagina of CA a child aged 11 years which caused penetration.
2. The alternative charge was Indecent Act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) no 3 of 2006. The particulars of the charge were that on the 23<sup>rd</sup> April 2013 in Nakuru district of the Rift Valley province intentionally and unlawfully committed an indecent act with a child by touching private parts namely vagina and buttocks of CA a child aged 11 years.
3. The appellant was convicted and sentence to serve life imprisonment hence this appeal which has raised several grounds and of greater significance are three grounds touching on his mental status, whether the age of the complainant was proved and whether the sentence was harsh in the circumstance.
4. When the matter came up for hearing the court directed that the same be determined by way of written submissions which the parties have complied.



### **Appellants submissions.**

5. The learned counsel for the appellant submitted that going by the psychiatric reports on record it was evident that the appellant was a person of unsound mind and that he may not have been in his right faculties at the time of the commission of the offence. He relied on the case of *DMM v Republic* (2016).
6. He further relied on the provisions of Section 162 of the *Criminal Procedure Code* as well as the case of Leonard Mwangenu Monyisia v, Republic Criminal Appeal No. 112 of 2014.
7. On the last issue he submitted that the age of the minor was not proved by the production of any supporting documents for instance an age assessment report.
8. He submitted that the sentence meted against the appellant was excessive in the circumstances contrary to the current trends pursuant to the *Muruatetu case*. He also relied on the case of *Morris Mukhebi Muhanya v Republic* (2020) eKLR.

### **Respondents submissions**

9. The learned state counsel opposed the appeal arguing in his submissions that the case was proved against the appellant beyond any shadow of doubt and that at the time of committing the offence he was in his full mental faculties. That he conducted the trial very well all through and that he only chose to keep quiet when defending himself which was still part and parcel of a defence.
10. He went on to submit that the ingredients of the offence had been established and that is why the trial court found the appellant guilty.
11. Further that if indeed the appellant was a person of unsound mind then he would have called at least some witness including family members to support this line of argument. He relied on the provisions of Section 9 and 12 of the *Penal Code*.

### **Analysis and determination**

12. The court at this level is expected to re-evaluate the evidence as presented and come up with a fresh finding noting that it did not have the opportunity to see the witnesses and their demeanour. See *Okeno v Republic* (1972) E A 32.
13. The ingredients of the offence of defilement are now well known, namely, the age of the complainant, the evidence of penetration as well as the identity of the perpetrator.
14. In this case, although there was no evidence as clearly submitted by the appellant's counsel of the victim's age, it was evident before the trial court that the p3 form which was produced indicated that she was around 11 years old or thereabouts. Ordinarily it is imperative that the respondent must establish the age by all means including the production of such documentary evidence like the birth certificate or such other legal documents.
15. In my view the absence of such production including an age assessment report did not oust the fact that the victim was a minor. Clearly she was not beyond 18 years old and in this case it will be reasonable to conclude that the minor was between the age of twelve and fifteen years old as described under Section 9(3) of the *Sexual Offences Act*. This conclusion in my estimation is appropriate considering the fact that the age estimated by the doctor who filled the p3 form was 11 years. As a safeguard I conclude the age to be between twelve and fifteen years.



16. Was the evidence of defilement proved? I think the answer is in the affirmative. The child clearly and graphically described how she was duped into believing that the person she was willing to assist take the phone took her to some bush and defiled her. The incident took very few minutes and she was led to go. She said that she was warned not to raise any alarm or else she was to be cut into pieces.
17. Her evidence was buttressed by that of PW3, another minor who was with her and who had declined to take the phone as requested by the appellant. She was the one who later led the other children scream when they saw the appellant and had him apprehended by the public as he attempted to run away.
18. PW4 as well confirmed that when the complainant arrived her clothes were soiled and had grass on her back and the head. This was evidence of her lying down. PW4 said that she was not walking well when she saw her.
19. The production of the PRC and p3 forms clearly demonstrated that there was penetration. In other words, she had been defiled as per the medical conclusion therein.
20. As regards the perpetrator, the witnesses, PW2 and PW3 clearly identified him. The incident took place during daytime and there was nothing to suggest that the assailant attempted to conceal his identity or at all.
21. The act of running away when confronted by the children screaming after him goes to show the guilty conscience on the part of the appellant.
22. His defence though recognised in law did not aid him as he left many unanswered questions. These questions included the contentious issue of his mental status. Of course legally he has no obligation to aid the respondents case, but in regard to his mental capacity it was his responsibility to rebut the allegation that he was of unsound mind prior to the incident, during the incident and after the incident.
23. On this line as well, it is true from the record that there were two conflicting medical reports namely from Dr. Wanjau and Felicita Mwangi. Both did not reach the same conclusion. The report from Mathari mental hospital as directed by the trial court was not produced neither was there any follow up.
24. Taking the totality of the medical evidence on record from the psychiatrists, it is more than probable that the appellant at the time of the incident was having the deceased of the mind. This is further supported by the fact that the appellant had other similar case in Nyahururu court which was still ongoing.
25. The appropriate sentence would have been that provided under Section 162 of the Criminal procedure code, namely, "guilty but insane". However, the fact that there was no conclusion medically must have left the trial court in a situation where it had to render the sentence it did.
26. This court nonetheless agrees with the said court that the appellant is guilty of the charges that faced him. He deliberately defiled the minor through hoodwinking her with kshs,100 which indeed he gave. This however he did after the heinous act.
27. As found above the age of the minor was not established by any documentary evidence and thus this court concludes that she was aged between 12 and 15 years. This has ramification on the sentence especially and in particular the term he is required to serve.
28. Before concluding on the sentence it shall be appropriate to determine the medical conditions of the appellant at the moment.



29. Consequently, this court holds in abeyance the conclusion of this judgement to allow the respondent and its agencies to determine the appellant's mental status. This matter shall be mentioned within 60 days from the date herein for further directions.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 1<sup>ST</sup> DAY OF MARCH 2023.**

**H. K. CHEMITEI.**

**JUDGE**

