



REPUBLIC OF KENYA



KENYA LAW
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**JMK v Republic (Criminal Appeal E006 of 2022)
[2025] KECA 1518 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KECA 1518 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL E006 OF 2022
JM MATIVO, GV ODUNGA & PM GACHOKA, JJA
SEPTEMBER 19, 2025**

BETWEEN

JMK APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. JMK, the appellant herein, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 1st December 2017 and 1st January 2018, at Kayole Estate Naivasha sub-county within Nakuru County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of LWK, a girl aged 7 years old.
2. The appellant was also alternatively charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 1st December 2017 and 1st January 2018, at Kayole Estate Naivasha sub-county within Nakuru County, the appellant intentionally and unlawfully caused his penis to come into contact with the vagina of LWK, a girl aged 7 years old.
3. The appellant was arraigned before the trial court in Naivasha Chief Magistrate's Court Criminal Case (SO) No. 8 of 2018 to answer to the charges. He pleaded not guilty to both counts. After a full trial, the appellant was convicted on the main charge and sentenced to life imprisonment. The appellant preferred an appeal before the Naivasha High Court in HCCRA NO. 12 of 2019. Ngenye-Macharia, J. (as she then was) found that the appeal lacked merit. It was dismissed on 3rd February 2022.
4. The appellant is aggrieved by those findings. He filed his undated notice of appeal, undated memorandum of appeal and supplementary grounds of appeal dated 12th May 2025. The summary of those grounds is captured as follows: the ingredients to the offence of defilement were not proved



- beyond reasonable doubt; that he was not afforded a fair trial; and that the sentence meted out was harsh, excessive and failed to consider his mitigation. For those reasons, the appellant urged this Court to allow his appeal, quash his conviction, set aside his sentence and that he be set at liberty.
5. The appeal was heard on 13th May 2025 on the basis of the parties' written submissions. The appellant was present while the respondent was represented by Senior Assistant Director of Public Prosecutions Mr. Omutelema. The appellant filed undated written submissions. He submitted that the trial court failed to acknowledge the appellant's objection to not being furnished with witness statements and documentary evidence by the prosecution. Consequently, his right to a fair trial was violated.
 6. Furthermore, the appellant argued that the trial court never bothered to inquire whether he was ready to proceed with the hearing or not. He faulted the actions of the prosecution for furnishing witness statements after two witnesses had testified. In his view, that violated his right to a fair trial on account of the fact that he was not adequately prepared to defend himself. On this ground alone, he urged this Court to quash his conviction.
 7. Attacking the aspect of penetration, an ingredient to the offence of defilement, the appellant submitted that it was not proved to the required standard of proof beyond a reasonable doubt. This is because there were no visible injuries on the complainant's private parts. He stated that a broken hymen was not conclusive proof of penetration, as it can be caused by other factors.
 8. Turning to the sentence, the appellant submitted that the same was harsh and excessive and failed to consider his mitigation. He urged this Court to reconsider the sentence in light of the decisions in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR), Republic vs. Ayako [2025] KESC 20 (KLR) and Republic vs. Manyeso [2025] KESC 16 (KLR). He prayed that his appeal be allowed.
 9. The respondent opposed the appeal. It filed its written submissions, list of authorities and case digest all dated 7th May 2025 to submit that all the ingredients to the offence of defilement, namely the age of the complainant, penetration and identity of the perpetrator were proved beyond reasonable doubt. Lastly, on the sentence meted out, the respondent argued that the same was lawful and in line with section 8 (2) of the *Sexual Offences Act*. The respondent urged this Court to dismiss the appeal, uphold the conviction and affirm the sentence.
 10. We have considered the parties' rival written submissions, examined the record of appeal and analyzed the law. Our duty as a second appellate court is set out in section 361 of the Criminal Procedure Code. As a second appellate court, we can only consider matters of law. Furthermore, this Court cannot interfere with concurrent findings of fact by the two courts below, unless such findings are based on no evidence or on a misapprehension of the evidence or where the courts below are shown to have taken into account wrong principles in making their findings. [See Chemagong vs. Republic [1984] KLR 611].
 11. The prosecution marshalled four witnesses in a quest to establish that the appellant committed the offence of defilement. The evidence on the record before us is as follows: PW1 LWK the Complainant, testified that she was a seven- year-old class one student at [Particulars Withheld] Primary School.
During their holiday season in December 2017, PW1 visited her grandmother who was living in Naivasha. Before their travel plans, the appellant informed her that he would escort her. It was her evidence that she knew the appellant as they stayed in the place, known as Maela.
 12. The appellant thus accompanied PW1 to Kayole, Naivasha.



One day, when her mother, PW2, was away the appellant took PW1 to the visitor's room where he used to sleep in the grandmother's home. He gave her food and locked the room. He lured her by stating that he would do something to her to make her stop urinating. He then lay her on the bed and defiled her. PW1 recalled that the appellant defiled her on the sofa and the bed. He also forced her to touch his penis.

13. On another occasion PW1 recalled that when her mother left the homestead to collect her birth certificate, the appellant took her to the visitor's bed, removed her clothes and his clothes and sexually assaulted her. He repeated the assault on the sofa threatening that if she told her mother, he would stab her with a knife. PW1 recalled that every time the appellant assaulted her sexually, she felt pain.
14. After the third occasion, when she was being bathed, PW2 noticed that she had a whitish discharge on her private parts. She asked PW1 to go to school after which she would take her to the hospital. She was thereafter taken to hospital. She was given treatment. By the time she was disclosing the offence, the appellant had already returned to his home. The matter was reported at the police station and the appellant was arrested.
15. PW2 testified that her daughter PW1, was born on 6th June 2011. She produced her birth certificate in support of her evidence. During the December 2017 holiday season, she had visited her mother in the rural home. She was accompanied by the appellant and her daughter PW1. While washing and preparing PW1 to go to school on 15th January 2018, PW2 noticed that she had a whitish discharge on her private parts.
16. PW2 took PW1 to the hospital. On examination, it was discovered that PW1 had been sexually assaulted. That was when PW1 disclosed that she had a been defiled by the appellant on three occasions. PW2 learned that PW1 did not disclose the offence because the appellant had threatened her. PW2 reported the matter at Naivasha Police Station. They were subsequently issued with a P3 form and the PRC form.

PW2 testified that the appellant was her first cousin.

17. PW3 Faith Wanjiku Ndaberi, a clinician at Naivasha County Referral Hospital examined the complainant on 15th January 2018. She observed that her hymen was broken. She had vaginal discharge on her private parts and had an infection. She formed the opinion that from the history and physical observations, the features were consistent with defilement. She filed the P3 form on 16th January 2018 that was produced in evidence. She also filed the PRC form on 15th January 2018.
18. PW4 PC Lydia Yator, the investigating officer testified that she received the report of the incidents on 16th January 2018. The same was reported by PW1 accompanied by PW2. PW4 interrogated the witnesses, recorded witness statements, collected evidence and preferred charges against the appellant. The appellant was arrested at Kongoni Police Station and escorted to Naivasha Police Station.
19. When interviewing the appellant, PW4 stated that the appellant disclosed he indeed had no grudge with PW1's family. He blamed the spirit of the devil for misleading him.

He disclosed that PW1 used to unzip her apron, and he got tempted and would then defile her.

20. At the close of the prosecution's case, the trial court found that the prosecution had established a prima facie case against the appellant. He was placed on his defence. His unsworn testimony was that on 1st December 2017, his cousin W asked him to accompany her to Kayole, Naivasha to sell charcoal and water. The appellant accepted the offer and stayed with her for two weeks. The appellant then returned to Maela where he was arrested one night. He learned that he had been accused of committing



- the offence of defilement. He was taken to Kongoni Police Station and subsequently Naivasha Police Station. He denied committing the offence stating that he had been persuaded by police officers to admit the offence in quid pro quo for goodies.
21. In order to sustain a conviction for a charge of defilement, the prosecution must prove beyond reasonable doubt the age of the complainant, penetration and the positive identification of the perpetrator. Based on this, did the two courts below correctly find that the appellant was guilty of the offence that he was charged with? That forms the issue for our determination in this appeal.
 22. On the complainant's age, PW1 testified that she was seven years old. PW2 confirmed that PW1 was born on 6th June 2011. She produced her birth certificate confirming this. The P3 form indicated that the minor was 7 years old. PW1 was a minor of tender years. The two courts below thus properly established that the prosecution had proved the age of the complainant. We shall therefore not disturb those findings.
 23. On penetration, PW1 testified that the appellant sexually assaulted her. The medical evidence of PW3 revealed that the complainant's hymen was broken. She had vaginal discharge on her private parts and had an infection. She formed the opinion that from the physical observations, the features were consistent with defilement. We therefore come to the conclusion that the aspect of penetration was proved beyond reasonable doubt in line with section 2 of the *Sexual Offences Act*.
 24. Was the appellant the perpetrator? The evidence relied on by the prosecution was that of PW1. She testified that when PW2 left her grandmother's house on three occasions, the appellant took advantage of her absence and on three occasions, sexually assaulted her in his room. She felt pain. She was threatened that if she disclosed the offence, he would stab her with a knife.
 25. We have carefully examined the evidence with scrutiny. PW1 was subjected to cross examination and remained emphatic that it was the appellant who had committed the offence. The appellant was well known to her. She had met him in Maela. PW2 testified that the appellant was her first cousin. Just like the two courts below, we agree that PW1's evidence was consistent and satisfied the test set out in section 124 of the *Evidence Act*.
 26. On whether his right to a fair trial was violated by the failure by the prosecution to furnish him with witness statements, the record before us shows that the appellant ably cross examined PW1 but elected not to cross examine PW2. He did not inform the trial court that he had not been supplied with the evidence of the prosecution as well as the witness statements. It is only on 11th October 2018 that he made an application for the supply of witness statements. In response, the prosecution informed the trial court that in fact he had been supplied with witness statements. Nonetheless, it was not averse to issuing them again. The fact of being served with witness statements before making his application was not denied by the appellant.
 27. On 20th February 2019, he informed the court that he had not been served with witness statements. This prompted the matter to be reserved for pretrial. The appellant confirmed that he was in receipt of the statements and documentary evidence the following day. He elected to proceed with the case and this confirms that he was satisfied with the proceedings thus far. Accordingly, we do not find any merit in this ground that the appellant was not accorded a fair trial.
 28. In the end, we find no reason to fault the concurrent findings of the two courts below. We therefore uphold the conviction.
 29. The appellant was sentenced to life imprisonment in line with section 8 (2) of the *Sexual Offences Act*. This sentence was upheld by the High Court. Taking into account the decisions of the Supreme Court



in Republic vs. Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) and Republic vs. Manyeso [2025] KESC 16 (KLR), where mandatory sentences were affirmed to be lawful, we see no reason to disturb the findings on sentence.

30. In the circumstances, we find that this appeal lacks merit on both conviction and sentence. Accordingly, it is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 19TH DAY OF SEPTEMBER 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

Deputy Registrar

