



**DMM v Republic (Criminal Appeal E165 of 2025)
[2025] KEHC 14519 (KLR) (16 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKADARA
CRIMINAL APPEAL E165 OF 2025
J WAKIAGA, J
OCTOBER 16, 2025**

BETWEEN

DMM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case no SO 110 of 2017 of the Makadara Chief Magistrates Court delivered on 31st January 2023)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act*, the particular of which was that on the month of July at [Particulars Withheld] in Industrial Area of the Nairobi county, intentionally caused his genital organ to penetrate the genital organ of TWM a child aged 12 years.
2. He faced as usual an alternative charge of committing an indecent act with a child contrary to section 11(1) of the act .
3. He pleaded not guilty to the aid charges and was tried, convicted and sentenced to life imprisonment.
4. Being aggrieved by the said conviction and sentence, he filed this appeal, initially at the criminal registry at Milimani as criminal appeal no E108 of 2023 having been granted leave in Misc. Application no E90 of 2023 to file an appeal out of time and raised the following grounds of appeal:
 - a. The trial court erred when she failed in realizing that the circumstantial evidence adduced at the trial did not place the appellant at the scene of the alleged crime.
 - b. The court erred on rejecting the appellant defence which reasonably exonerated him.
 - c. The identification of the appellant was not proper



- d. The appellant was convicted on the basis of the complainant's incredible evidence
 - e. The age of the complainant was never established
 - f. The appellant was convicted on the basis of the complainant's single evidence without giving reasons for believing the same.
5. The respondent filed grounds of opposition to the appeal and stated as follows:
- a. The appeal is misconceived and unsubstantiated
 - b. The appeal is an abuse of the court process since the appellant was properly convicted.
 - c. The prosecution discharged its burden of proof beyond reasonable doubt

Submissions

6. Directions were issued for the disposal of the appeal by way of written submissions which were duly filed as at their time when this appeal was transferred to this Registry.
7. For the appellant as is their norm, the same submitted that his constitutional right to legal representation under Article 43(1) and right to free and fair trial under Article 50(2) (h) which include the to have an Advocate assigned to him by the state and at state expense if substantial injustice would otherwise occurred were violated in that he proceeded with the case as a lay man who was ambushed in the manner the trial proceeded and that his request for DNA analysis was denied and in support thereof he submitted the Case of Kenga Hisa v R [2020] eKLR where their court (Nyakundi J) stated that courts must not lose sight of the fact that a large part of the citizenry are not endowed with the knowledge on how the court work.
8. It was submitted that the right to fair trial was a norm of International Human Rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms as guaranteed under Article 14 of the International Conventions on Civil and Political Rights.
9. It was contended that the appellant did not well cross examine the star prosecution witness given his level of illiteracy and the seriousness of the offence and therefore should have been assigned an advocate at the state expenses.
10. It was submitted further that the appellant did not benefit from the provisions of section 200 of CPC as the court failed to inform him of the right to respond.
11. It was contended that the prosecutions witnesses were not truthful and credible and that in assessing two conflicting versions all the evidence should be considered and none should be ignored as was stated in Sv Langebarg [2017] ZAFSHC 49. It was submitted that PW 1 stated that she was born on 13th August 2005 which was confirmed by her mother and that the appellant defiled her on 27th July 2017 and repeated the ordeal two weeks between 9th August and 11th August 2017 yet she had stated that she ran from home on 2nd August 2017, it was submitted that it was not possible for a child of 12 years to sustain an act of marriage without any physical injuries. It was contended that there were contradiction and inconsistencies in the prosecution case, which should have been resolved in his favour as per Richard Munene v R [2018] eKLR.
12. On penetration it was submitted that the prosecution failed to prove that the same was by a male sexual organ and that the p3 firm did not indicate the organ used. It was submitted that the medical expert alluded to the fact that their presence of wound was not in itself incriminatory.



13. It was finally submitted that the life sentence was excessive harsh and fettered with the discretion of the court. It was submitted that PW2, the mother of the victim was under no obligation to care and support the welfare of the appellant creating a feasible conclusion that the circumstances disclosed the appellant vulnerability under PW2 who had issues with him, which led to his conviction.
14. On behalf of the respondent, it was submitted that the evidence of the minor was consistent and supported by the medical evidence produced by PW5 and . on identification it was submitted that the appellant and the victim knew each other as the two were father and daughter and that the appellant lived with the mother of the victim , though it was not proved that he was a step father.it was submitted that the offence occurred in the appellant home and therefore identification was free from error.
15. On the appellant defence it was submitted that the same was mere denial and uncorroborated , having failed to call his brother to corroborate .

Proceedings

16. This being a first appeal, the court is required to re-evaluate the evidence tendered before the trial court and to come to its own determination thereon.
17. PW 1 a child who was found to understand oath testified that he knew the appellant who used to live with her mother when she came visiting, the appellant removed her clothes including pants, placed her on bed, removed his penis and placed it in her vagina, then sent her to the shop to buy chips. On 2nd august 2017 when she returned home from school and saw the appellants shoe outside the house, she ran away and met two women, to who she reported that she was lost and was taken to the police station.
18. PW2 the mother stated that the complainant was 12 years and that she knew the appellant as her husband and step father of PW1. On 2nd august, she returned home sand found her missing. She made a report to the police, she was later found at the police station where she had reported the defilement by the appellant twice.
19. PW3 Bessy Wacheke Njoroge produced the medical report which confirmed swelling on the lower back and pain on both thighs. She had a reddening vagina and hymen. PW4 Esther Kinyua confirmed the age of the victim and the report that the appellant defiled her twice when her mother had gone to work. That on 2nd august 2017 when she saw the appellant shoe at the door of the house, she ran away and was rescued, taken to the police station where she reported her ordeal at the hand of the appellant.
20. PW5 Dr. Kamau Mariga produced the P3 form which confirmed that the victim's hymen was intact, with smooth wall and no discharge. He classified her injuries as harm.
21. When put on his defence the appellant stated that he used to live at Kingston as a hawker and that on 11/8/2017 he had a quarrel with his wife over Chama money, he was arrested by police and taken to the police station and when he sent his brother to the house, he found that his wife had moved out.

Determination

22. From the proceedings herein, the following issues are identified by the court for determination:
 - a. Whether the appellant constitutional right to legal representation was violated and the effect thereon
 - b. Whether the appellant was positively identified
 - c. Whether the prosecution case against the appellant was proved.



- d. Whether the sentence herein was harsh and excessive
23. The issue of legal representation, is now the new frontier by all the appellants who find themselves convicted by the law court in sexual offences. It is not worthy that the same is being raised at the appellate stage having not been raised before the trial court and being a constitutional issue, this court is under an obligation to decide the issue in the first instance as should the court find for the appellant then the appeal herein will stand allowed.
24. The issue of legal representation has since been put to rest by the Superior courts and this court does not desire to create any new jurisprudence thereon save that I totally agree with the following position taken by the court.
25. The right to legal representation has been settle in the Court of Appeal case of Manyeso versus Republic [2023] KECA thus:

“Secondly, the appellant claims that his right to legal representation was also violated. Article 50(2)(g) and (h) of *the Constitution* in this respect provides that the right to a fair trial includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly;h.to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

This court (Kairu, Mbogholi-Msagha and Nyamweya JJA) held in William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) versus Republic (Criminal Appeal 49 of 2020) [2022] KECA 23 (KLR) that the operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial. The court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since *the Constitution* demands it. However, in the present appeal, the appellant did not raise the issue of legal representation either in the trial court and the High Court, and the record of the trial court shows that the appellant participated in the trial and cross-examined the witnesses, and it is not evident that he suffered any or any substantial injustice. For these reasons, we do not find any merit in the appellants arguments that their rights to a fair trial on under articles 50(2)(g) and 50(2) (h) of *the Constitution* were violated.”

26. I therefore find and hold that though the appellant was a layman and might not have understood the rigors of the court system, the case he was facing was not that which involved complex issues which would have led to substantive injustice. He was able to cross examine the prosecution witnesses and offer a reasonable defence.
27. The appellant has also raised in his submission the issue of his right under section 200 of the Criminal procedure Code. I have noted from the proceedings that on 19th January 2022, when the new magistrate took over the proceeding, the appellant upon being explained to his right under the section, stated that he wanted the matter to start afresh on the basis that he had not been supplied with witness statements when the matter proceeded before the previous magistrate.
28. In response the prosecution contended that the matter was a 2017 matter and two witnesses had testified and that the appellant had been supplied with witness statement , the court while declining the appellants request for denovo proceedings ordered that an inventory of the documents supplied be



filed in court and as at 18th February 2022, the appellant had not been supplied with statement, leading to the only logical conclusion that the appellant proceeded with the evidence of the two witnesses in the absence of witness statement and was therefore prejudiced in addition to his constitutional rights under Article 50 of *the Constitution* being violated.

29. In this I find support in the Court of Appeal decision in Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR where the court stated as regards section 77 of the retire constitution which is equivalent to Article 50(2) (j) thus “ we think it is now established and accepted that to satisfy the requirement of a fair trial guaranteed under section 77 of our constitution , the prosecution is now under a duty to provide an accused person with and to do so in advance of the trial , all the relevant materials such as copies of the statement of the witnesses who will testify at the trial
30. The reason advanced by the appellant for seeking denovo proceeding in view of what I have stated herein was one which a court properly exercising judicial mind should have allowed the appellant request, noting that only two witnesses had testified and the prosecution had not advanced any reason for the hardship in securing the attendance of the said witnesses.
31. In this I find support in the Court of Appeal decision in Anthony Otieno Ndonji versus Republic [2019] KECA 229 (KLR) where the court stated that participating in the trial and cross examining witnesses and advancing a defence is not absolution from the compliance with requirement of section 200(3) which therefore vitiated the trial.
32. The question therefore is what the court ought to do having come to the conclusion that the trial was violated? There are two options available to the court , either to order a retrial or free the appellant .
33. The principles for retrial were answered by the court of Appeal in Jason Akhaya Makokha v Republic [2014] e KLR.
34. In this matter I have considered the age of the case and the allegations upon which the appellant was charged and feel that it is not in the best interest of justice to order a retrial.
35. Should I be wrong on the determination herein above then on the identification of the appellant, from the evidence, the same was identified through recognition. He was living with the complainant’s mother in what she considered as husband and wife. In his submissions he has confirmed that they were living together in what he considered himself vulnerable and therefore his identification was free from error. However, there is a gap in the prosecution case on how the appellant was arrested, the arresting officer was not called to testify and the woman who rescued the complainant and allegedly took her to the police station and the report allegedly made by the mother to the police on missing child were not produced to corroborate the case of the prosecution the benefit of this gap should have been granted to the appellant.
36. On the appellant defence, I find that the trial court did not interrogate the issue of the grudge between the appellant and the mother of the complainant, the issue before the court was not whether the mother had couched PW1
37. On proof of penetration, though since her hymen was intact the trial court found that penetration was partially which was against the evidence by the complainant that the appellant inserted his penis into her vagina not once but twice. I however take the view that intact hymen does not rule out penetration and therefore agree that the prosecution proved penetration .
38. The age of the complainant too was not disputed and was therefore proved through her evidence and that of her mother PW2, as corroborated by PW3 and PW5 and therefore find no fault with the trial court finding thereon.



39. On sentence, the appellant was charged under section 8(3) which provides for a sentence of not less than twenty years, whereas the appellant herein was sentenced to life imprisonment without any justification thereof provided for by the court. I would therefore agree with the submission by the appellant that the sentence herein was harsh and excessive, noting that the appellant was not charged with and tried of the offence of incest.
40. It must however be noted that the authorities submitted by the appellant on the courts discretion on sentence were pre the supreme court decisions of Joshua Gichuki Mwangi v Republic and Republic versus Julius Kitsao Munyeso [2025] KESC 16 (KLR) both which reinstated the mandatory nature of sentences on the charges arising from Sexual offences Act and would therefore substitute the life sentence herein with a imprisonment term of twenty years .
41. In the final analysis having found that the trial of the appellant was vitiated by the none compliance with the provisions of Article 50 of the Constitution and section 200(3) of the CPC, I allow the appeal herein on conviction which I hereby set aside and quash the sentence herein.
42. That does not mean that the appellant is not culpable of the offence herein, I find him a man of no honour who despite the fact that the victims mother had allowed him in her house , opened for him her vagina and heart, still found it not shameful to pray on her twelve year old daughter and still come before this court alleging that he was vulnerable , yet holding himself out as the head of the household and a caring father who could not keep off the victim, causing her the stress of her life time to the extent of running away from home just at the site of the appellants shoe for she knew what was a waiting her, had she entered into the house in the absence of her mother , the appellant would have once again inserted his penis into her vagina at the price of a plate of chips and thereafter waited to insert the same into her mother's without shame.
43. This is a matter which should have been referred for retrial and the appellant charged with incest which would have attracted the life imprisonment, the trial court was ready to give.
44. The appellant shall however be set free hoping that he has learned a lesson or two from his deserved stay in prison.
45. The state has a right of appeal and it is ordered.

DATED SIGNED AND DELIVERED THIS 16th OCTOBER 2025

J WAKIAGA

JUDGE

In the presence of C/A Irene

Ms Kariuki for the State

The appellant in person from Kamiti maximum

