

**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: MATIVO, GACHOKA & ODUNGA, JJ.A.)

CRIMINAL APPEAL NO. NAK 4 OF 2020

BETWEEN

PETER NDUNGU MATIMU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from the conviction and sentence of
the High Court of Kenya at Nakuru (K. W. Kiare, J.)
dated 5th December, 2019*

in

Criminal Appeal No.46 of 2012).

JUDGMENT OF THE COURT

1. Peter Ndungu Matimu (the appellant), was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act (the Act) at the Chief Magistrate's Court at Nakuru in Criminal Case No. 17 of 2011. The particulars of the offence were that on 14th and 28th January 2011 within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the vagina of BWK, a child aged 9 years. The appellant faced an alternative count of

committing an indecent act with a child contrary to section 11

(1) of the Act.

2. The prosecution case rested on the testimony of 6 witnesses, namely, the complainant (PW1) who gave unsworn testimony, the complainant's grand mother (PW2), a village elder (PW3), the area Chief, (PW4), a Clinical Officer at Lari Health Centre (PW5) and the Investigating Officer, (PW6). The defence case rested on the appellant's sworn testimony. He did not call any witness in support of his defence. At the conclusion of the case, the trial court returned a verdict of guilty on the main count of defilement. After considering the appellant's mitigation, the trial Magistrate sentenced him to serve life imprisonment as decreed by section 8 (2) of the Act.
3. Dissatisfied by the said decision, the appellant appealed to the High Court at Nakuru in Criminal Appeal No. 46 of 2012 seeking to overturn his conviction and sentence. After hearing the appeal, **Kiarie, J.** upheld both the conviction and sentence and dismissed the appeal on 10th December 2019.

4. Undeterred, in this second appeal, the appellant seeks to reverse the High Court decision citing 5 grounds in his memorandum of appeal dated 24th December 2019, namely:

(a) mandatory sentences were declared unconstitutional by the Supreme Court; (b) the prosecution did not prove its case beyond reasonable doubt; (c) his right to a fair trial under article 50 of the Constitution was violated; (d) the burden of prove was shifted to him to his prejudice; (e) his sworn and un rebutted defense was dismissed.

5. During the hearing of this appeal on 12th May 2025, the appellant appeared in person while the respondent was represented by learned counsel Mr. Omutelema, Senior Assistant Director of Public Prosecution. Both parties relied on their written submissions.
6. In support of his appeal, the appellant submitted that the life sentence imposed on him is not only a cruel, inhuman and degrading punishment, but also it violates his right to life, and, he has a legitimate expectation to enjoy the full benefit and protection of the law, therefore, his rights were violated when he was sentenced to serve a harsher sentence in contravention of article 50 (2) (p) of the Constitution which guarantees an accused person the benefit of the least severe punishment.
7. He also submitted that mandatory sentences deprive

courts

the discretion to impose appropriate sentences bearing in

mind the peculiar circumstances of each case. To buttress this submission, he cited this Court's decision in **Dismas**

Wafula

Kilwake vs. Republic [2019] eKLR, though rendered in the context of the death penalty, in support of the proposition that mandatory sentences deprive courts the jurisdiction to exercise discretion to impose appropriate sentences depending on the peculiar circumstances of the offender.

- 8.** The appellant urged that his right to a fair trial was violated contrary to articles 25 and 50 of the Constitution because he was not provided with legal representation at the expense of the State nor was he informed of his right to legal representation. He maintained that courts should take strides to promote the protection and observance of human rights in all spheres of life. He contended that in criminal trials, it makes a lot of difference if an accused person is unrepresented because of the complexities in the adversarial system which are difficult for a lay person to comprehend and cited Lord Denning in the case of **Pett vs. Greyhound Racing**

Association Ltd. [1968] 2 W.L.R. 1471 where he stated:

“It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or

wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?"

9. He also cited the High Court decision in **Macharia vs. Republic [2014] eKLR** in support of the court holding that persons accused of capital offences have the right to legal representation at the state expense.
10. The other ground urged by the appellant is that the trial court did not consider his defence nor did the prosecution discharge its burden of proof, therefore the conviction ought to be set aside. Alternatively, a definite sentence ought to be imposed considering that he is 74 years old and his health is deteriorating.
11. In opposing the appeal, the respondent's counsel Mr. Omutelema submitted on 3 main points, essentially, maintaining that the ingredients of the offence were proved. He argued that there was overwhelming evidence of penetration. He recalled PW1's evidence that the appellant took her to his house and did "*bad manners*" to

her, and he

had also previously defiled her in his house and as a result, she experienced too much pain and she could not urinate. Further, the doctor confirmed that she was defiled.

12. Regarding the complainant's age as at the time of the defilement, Mr. Omutelema maintained that the charge sheet indicated that she was aged 9 years, that the complainant testified that she was 9 years old, PW2 and PW3 also confirmed that she was 9 years old, while PW5, the Clinical Officer in his treatment notes indicated that she was 8 years old. Therefore, her age was sufficiently proved as was rightly observed by the trial court.

13. Submitting on the ingredient of identification, Mr. Omutelema maintained that the complainant was not mistaken in identifying the appellant since he had defiled her twice and she was also able to identify him in court, therefore her evidence was credible and truthful and the same was rightfully acted upon by the two courts below.

14. Mr. Omutelema also submitted that PW3, who knew the appellant very well as a neighbour and a friend to PW2's husband found the complainant in the appellant's house.

He

also submitted that the appellant was arrested together with the complainant and both were taken together to the hospital.

15. Regarding the sentence, Mr. Omutelema submitted that the trial court accorded the appellant a chance to mitigate before passing the sentence. It was his submission that the aggravating circumstances of the case justified the sentence in question. Furthermore, the mandatory sentence applicable for the offence is life imprisonment and there cannot be a departure from it as was held by the Supreme Court in

Republic vs. Joshua Gichuki Mwangi SCORK Petition E018 of 2023 [2024] KESC 34(KLR).

16. This is a second appeal, therefore, our jurisdiction is limited to considering matters of law as stipulated by section 361 of the Criminal Procedure Code. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at by the two courts below unless such findings are based on no evidence or are based on a misapprehension of the evidence or the courts below are demonstrably shown to have acted on wrong

principles in arriving at their findings. (See **David Njoroge Macharia vs.**

Republic [2011] eKLR and **Karani vs. R. [2010] 1 KLR 73).**

Similarly, the Supreme Court in **Republic vs. Joshua**

Gichuki Mwangi (supra) stated:

“Thus, the Court of Appeal’s jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent’s appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal’s jurisdiction.”

17. We have reviewed the record as well as submissions. In our view, the issues for determination are: (a) whether the offence of defilement was proved beyond reasonable doubt; (b) whether the appellant’s defence was considered by the two courts below; (c) whether the appellant’s right to a fair trial was violated; and (d) whether a case has been made for this Court to interfere with the sentence imposed upon the appellant.
18. A reading of Section 8 (1) and (2) of the Sexual Offences Act

shows that there are three critical elements that must be proved in a prosecution under the said provisions. These are

the victim must be a child aged 11 years or less, there must be penetration of the genital organ, and, the identity of the offender must be proved. These three ingredients must be proved for the prosecution to succeed.

19. First, we will address the question whether penetration was proved to the required standard. The trial court and the first appellate court were persuaded that the evidence tendered established that the complainant was defiled. PW1 in her unsworn testimony recalled how the appellant found her playing near the road next to their house, he held her and took her to his house and did "*bad manners*" to her. She narrated how the appellant removed her skirt, blouse and panty and also removed his trousers and panty and did bad manners to her. It was her evidence that she felt a lot of pain when she tried to urinate. She testified that the appellant defiled her on three different occasions. PW3 who is a Village Elder testified that PW1 told her that the appellant used to defile her on his bed and give her sweets. Her evidence was corroborated by PW5, the Clinical Officer who testified that she examined the complainant on 29th January 2011. She noted that her hymen was broken,

approximately two weeks prior and her vulva was

red and she was in pain and had a foul-smelling yellowish discharge. We have re-evaluated the evidence on record. We see no reason to doubt the concurrent findings by the two courts below. There is nothing to suggest misdirection on the part of the two courts below nor has it been demonstrated that the two courts below failed to consider relevant matters or took into account irrelevant considerations.

20. Regarding the question whether the complainant's age was proved, PW1 testified that she was 9 years old. PW2, also gave her age as 9 years, thus corroborating her evidence. The immunization card produced by PW 6 gives her date of birth as 10th March, 2002. Therefore, at the time of the offence, she was aged 8 years and 10 months. This Court in **Mwalango**

Chichoro Mwanjember vs. Republic [2016] eKLR stated:

"The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held

in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v R, Cr Appeal No 19 of 2014 and Omar Uche v R, Cr App No 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age

by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Crim Appeal No 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

21. We are persuaded that the evidence tendered sufficiently proved that the complainant was almost 9 years old at the time when she was defiled. In terms of section 8 (2) of the Act, she was aged below 11 years which brings her within the purview of the said section. Therefore, the ingredient of the complainant's age was proved beyond reasonable doubt. Age is an issue of fact. We find no reason to depart from the concurrent findings by the two courts below on this issue. It has not been demonstrated that the two courts below misconstrued the evidence or based their finding on irrelevant considerations or failed to consider relevant material. Importantly, the evidence on age was not discredited.

22. Lastly, is the question whether the appellant was properly identified as the offender. Notably, it was not disputed that the complainant and the appellant were neighbours, and

that she knew the appellant prior to the incident.

Remarkably, the

defilement was not done once. Addressing this issue, the first appellate court stated:

“10. B.W (PW1) in her evidence testified that the man who did bad manners to her was called Peter and she identified him in Court. According to her, she was playing near the road next to their house. The appellant held her and took her to his house and did what she called bad manners to her. In her evidence she said that he did bad manners to her on three occasions. At the time of the appellant's arrest she testified that she was the one who pointed him out to the police.

11. Anne Waithera Mwarigi (PW3) is the village elder from where both the complainant and the appellant reside. She testified that the complainant informed her that the appellant used to defile her on his bed and give her sweets. This allegation was repeated by the area chief Lewis Kiaraho Mwangi (PW4) who testified to the same effect.”

23. There is no doubt that this was a case of recognition rather than identification. The appellant did not demonstrate by way of evidence that his identification was erroneous or unsafe. He did not deny he was not a neighbor to PW1 who also stated that he had previously defiled her. Having considered the evidence of PW1 and PW3, we find that the evidence on identification irresistibly pointed to the appellant as the offender. We therefore find no reason to

fault the two courts below on this issue.

24. Concerning the argument that the first appellate court failed to appreciate that the appellant's defence and that there was no witnesses to the alleged defilement, we may profitably quote this Court in **Kigen vs. Republic [2025] KECA 131 (KLR)** where addressing a similar complaint it stated:

“it is important to mention that by requiring the trial court to consider and weigh an accused person’s defence does not mean that its judgment must include a complete embodiment of all defence led, as if it comprises a transcript of the proceedings. In order to determine whether there is any merit in the said complaint, this Court must consider the defence led in the trial court, juxtapose it against the trial court’s judgment, and finally determine whether there is any basis for interfering with the said judgment, bearing in mind that the onus to prove the case beyond reasonable doubt lies upon the prosecution. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.”

25. Addressing the issue at hand, the High Court stated:

“Though the appellant raises an issue with the judgment that the learned trial magistrate did not consider his defence this is not the true position. Upon my reading of judgment, I find that the magistrate considered his defence before dismissing it. This ground also lacks merit.”

26. Upon evaluating the impugned judgment, we are persuaded that the first appellate court correctly concluded that the trial

court considered the appellant's defence. We find no justification to find otherwise. Perhaps we can only add that the appellant's defence did not dislodge the prosecution evidence. Consequently, there is no basis for us to interfere with findings by the first appellate court on the issue at hand.

27. Regarding the contention that the appellant's rights to a fair trial guaranteed under article 25 (c) and 50 (2) (g) & (h) of the Constitution were violated, and in particular the failure to accord him legal representation at the expense of the state or by failure to inform him of his right to legal representation, we note that the appellant raised the said issue in his supplementary grounds of appeal dated 2nd July 2019 before the High Court albeit imprecisely. However, the said ground was not considered by the first appellate court. This Court in

William Oongo Arunda (Hitherto referred to as Patrick

Oduor Ochieng) vs. Republic [2022] KECA 23 (KLR)

held 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.

28. There is no indication in the record that the appellant was informed of his right to legal representation. However, the appellant never raised the issue of legal representation before the trial court. Before the High Court, we note that even though the appellant raised the issue of his right to a fair trial being violated, the said issue was never elucidated and therefore the issue of legal representation as stipulated under Article 50 (2) (g) and (h) never came out clearly. Nevertheless, the record of the trial court shows that the appellant participated in the trial and cross-examined the witnesses. Therefore, there is nothing to show that the appellant suffered substantial injustice or that the case was complex as envisaged in the above cited case. Consequently, we do not find any merit in the appellant's argument that his right to a fair trial under Articles 50 (2) (g) and 50 (2) (h) of the Constitution were violated.

29. In any event, the appellant did not raise the issue of legal representation either before the trial court or before the High Court. In fact, the trial court record shows that the appellant participated in the trial and cross-examined the witnesses (PW3 - PW6), and it is not evident that he suffered any substantial injustice. For these reasons, we do not find any merit in the appellant's arguments that his rights to a fair trial on under articles 50 (2) (g) and (h) of the Constitution were violated.

30. Regarding the constitutionality or otherwise of the sentence life imprisonment and the contention that the mandatory nature of the sentence deprives courts the discretion to impose an appropriate sentence, it is noteworthy that the sentence provided for defilement of a child aged 11 years or below under section 8 (2) of the Act is the life imprisonment. However, we have carefully considered the appellant's petition of appeal before the High Court, the supplementary grounds of appeal dated 2nd July 2019 and his submissions before the High Court. We note that the appellant did not specifically complain about the constitutionality of the life sentence imposed on him before

the High Court, therefore, the High Court did not have

the benefit of addressing its mind to the said issue. We are therefore precluded from addressing the said issue.

31. The above notwithstanding, it is also important for us to mention that the Supreme Court in **Republic vs.**

Mwangi;

Initiative for Strategic Litigation in Africa (ISLA) & 3

Others (Amicus Curiae) [2024] KESC 34 (KLR) clarified that in the Muruatetu case, the court solely considered the mandatory sentence of death under section 204 of the Penal Code in relation to murder cases. It did not address the mandatory minimum/maximum sentences under the Sexual Offences Act. Therefore, mandatory sentences that apply for example, to capital offences, are vastly different from minimum sentences such as those found in the Sexual Offences Act, and the Penal Code and reiterated that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This means that until the law is changed or the Supreme Court rules differently,

our hands are tied. However, we hasten to add that the
sooner this issue is

resolved, the better to bring to an end the obvious discrimination in the sentencing policy.

32. Arising from our analysis of all the issues discussed above and our answers to each and every issue, the inevitable conclusion is that this appeal is without merit and the same is hereby dismissed in its entirety.

Dated and delivered at Nakuru this 3rd day of October, 2025.

J. MATIVO

.....
... **JUDGE OF
APPEAL**

M. GACHOKA C. Arb, FCI Arb.

.....
... **JUDGE OF
APPEAL**

G. V. ODUNGA

.....
... **JUDGE OF
APPEAL**

*I certify that this is
a true copy of the
original.
Signed.*

DEPUTY REGISTRAR.