Mwamuya v Republic (Criminal Appeal E092 of 2023)
[2025] KECA 1547 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1547 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E092 OF 2023

PO KIAGE, WK KORIR & JM NGUGI, JJA

OCTOBER 3, 2025

BETWEEN

GIFT JIRANI MWAMUYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Machakos (L.N. Mutende, J.) dated 17{{^th}} March 2015 in HCCRA No. 120 of 2012)

JUDGMENT

1. Gift Jirani Mwamuya, the appellant herein, is before us dissatisfied with the conviction and sentence for defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. From the particulars of the charge, the offence was alleged to have occurred against MM, a child aged 4 years on 26th February 2012 at about 1.00 pm in Kibwezi District within the defunct Eastern Province. Arising from the same facts, the appellant was faced with an alternative charge of committing an indecent act with a child contrary to section 11 of the *Sexual Offences Act*. At the conclusion of the trial, the appellant was found guilty, convicted and sentenced to 35 years imprisonment in respect of the main count. His appeal to the High Court failed, and his sentence of 35 years' imprisonment was instead enhanced to life imprisonment.

2. Before us, the appellant in his memorandum of appeal dated 7th October 2023 raises 9 grounds which we condense as: violation of the appellant's right to legal representation; failure by the first appellate court to discharge its mandate; the offence was not proved; the evidence of PW5 was improperly received; failure to appreciate the import of Article 50 of *the Constitution*; failure to consider the appellant's defence; and, erroneous enhancement of the sentence by the first appellate court.

3. In a nutshell, the evidence at trial was that on 27th February 2012, the appellant, who was a neighbour of MM (PW1), led her to his house under the pretext that he was taking her to join other kids to play.

While inside the house, the appellant proceeded to remove her panties before removing his trouser and inserting his penis in her vagina. She felt a lot of pain. AN (PW2), the mother of MM and a sister to the appellant, discovered the defilement on 3rd March 2012 when she was hit by a foul smell while changing MM's clothing. Upon examining the child, she saw a pus-like discharge. AN recalled that there was indeed a Sunday that MM had disappeared for a while and later reappeared from the appellant's house. A neighbour, RK, who is similarly indicated in the record, we presume erroneously, as PW2, was called by AN. and she confirmed the vaginal discharge and heard MM state that the appellant had defiled her on a Sunday. The child was thereafter taken to the hospital, where she was treated for a sexually transmitted infection (STI) and the incident was reported to the police. The appellant was arrested by David Wainaina Kamau (PW3), a Kenya Wildlife Service (KWS) warden who lived in the same camp with the child and the appellant. When MM was presented for examination by Dr. Hannington Mibei (PW4) at Makindu District Hospital, the doctor observed that she walked with difficulty. Other observations were that the vulva was open and the labia majora swollen. MM also had a white discharge and pus. She tested positive for STI. The appellant was also tested, and there was the presence of pus cells in his urine, signifying the presence of STI. PW4 produced the P3 form he filled out for MM as an exhibit. Jemimah Thirikwa (PW5) of Mtito Andei Police Station investigated the matter and had the appellant charged. She testified that she inspected the child and saw a discharge.

4. When placed on his defence, the appellant, who testified as DW1, accounted for his movements on 26th February 2012 by stating that after he woke up in the morning, he carried out cleaning chores until midday, when he went to buy food for his lunch meal. When he came back, he prepared and ate lunch before going to watch a football match. Thereafter, he returned home and slept. It was only on 4th March 2012 that he was arrested from his house and later charged. He denied committing the offence, stating that David Wanaina Kamau had previously claimed that he had slept with his wife, while AN and RK had a grudge with him and had threatened to have him jailed.

5. When this appeal came for hearing before us on the virtual platform on 9th April 2025, the appellant, who was represented by learned counsel Mr. Kyule, was present from Manyani Maximum Prison, while the learned Assistant Director of Public Prosecutions, Mr. Yamina, appeared for the respondent. Mr. Kyule made brief oral highlights on top of the written submissions, while Mr. Yamina entirely relied on his written submissions.

6. In the submissions dated 7th October 2023, learned counsel, Mr. Kyule, addressed the Court on two issues. First, counsel urged that there was a breach of the appellant's right to legal representation and the right to benefit from the least severe of the prescribed punishments for the offence as guaranteed by Article 50(2)(h) & (p) of *the Constitution*. Counsel argued that because the appellant was not represented before the trial court and the first appellate court, the proceedings before those two courts infringed on his rights. Secondly, counsel contended that the sentence of life imprisonment was excessive and served neither the interest of justice nor those of society, more so, when it is considered that the appellant was a first offender. Counsel urged us to take a cue from Evans Wanjala Wanyonyi v Republic [2019] eKLR and find that the constitutionality of a life sentence is a question of law thus falling for our consideration. Mr. Kyule submitted that the appellant, having been in prison for 10 years,had reformed and was ready for reintegration into society. He therefore urged us to allow the appeal and set his client free.

7. In opposition to the appeal, Mr. Yamina rehashed the evidence adduced at the trial and submitted that the offence of defilement was established against the appellant. Responding to the appeal against sentence, learned prosecution counsel conceded that the first appellate court's enhancement of the sentence imposed by the trial court is a legal question which can be considered by this Court. He,

however, argued that the life sentence imposed by the first appellate court remains lawful unless and until Parliament does away with it. In the end, counsel urged us to dismiss the appeal.

8. Our jurisdiction, which the appellant seeks to invoke, stems from section 361(1) of the Criminal Procedure Code and is focused on matters of law and not facts, which were presumably settled by the two courts below. As was held in Dzombo Mataza v Republic [2014] KECA 831 (KLR), our interference with factual conclusions is only warranted where those courts considered irrelevant facts, neglected relevant ones, or were plainly wrong in their decisions. Further, the severity of sentence is a matter of fact, and our interference is only allowed where the trial court had no jurisdiction to pass the sentence or where the sentence was enhanced by the High Court, as was the case herein. Additionally, we must limit our determination to issues that were raised before the first appellate court. These principles of law were reiterated by the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) as follows:

> "The record also shows that issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by counsel representing the respondent. Having combed through the Record of Appeal and proceedings, we note that the constitutionality of the respondent's sentence was also not raised either before the trial court or the High Court. The respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before the Court of Appeal.
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> 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."

9. Relying on the pronouncement of the Supreme Court, it follows that the questions of the constitutionality of the life sentence and that of alleged denial of the right to legal representation under Article 50(2)(h) of *the Constitution* do not arise for our determination because they were not raised for determination by the first appellate court. We additionally note that when the appeal came up for hearing, learned counsel for the appellant indicated that he was abandoning the issue of the alleged violation of the appellant's right to legal representation. Equally, the challenge as to the admissibility of the evidence of Dr. Mibei is also coming up for the first time before us and suffers the same fate. However, we must point out that we have looked at the P3 form filled out for the minor, and we find that Dr. Mibei signed it himself.

10. Having disqualified the above grounds of appeal, the only issues that remain for our consideration are whether the offence was proved and whether the enhancement of the sentence by the High Court complied with the law.

11. Before we assess whether the elements of the offence of defilement were established, we find it prudent to address, on a suo moto basis, the manner in which the evidence of M.M. was received by the trial court. MM was said to be 4 years old and was, therefore, a child of tender years hence, her evidence could only be recorded upon compliance with the provisions of section 125(1) of the *Evidence Act* as read with section 19 of the *Oaths and Statutory Declarations Act*. Therefore, the evidence of MM could only

be received after she had been taken through a voir dire examination. The two ways of conducting a voir dire examination were highlighted in Maripett Loonkomok v Republic [2016] KECA 520 (KLR) as follows:

> "Although this decision, through section 19 of *Oaths and Statutory Declarations Act* underpinned the legal practice in relation to children's testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R [1983] KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and Another v Msa Criminal Appeal No.373 of 2006."

12. In the present case, the learned trial magistrate did not adopt any of the formats highlighted above. Instead, the record reads as follows:

> "Court: The Court after having spent time with the child and have done voir dire. She will give an unsworn statement as she is incapable of understanding the nature of an oath and its purpose."

13. We wish to reiterate that voir dire examination should be conducted as was explained in Maripett Loonkomok v Republic (supra). It must be recalled that on appeal, all that the appellate court can rely on is the record. The only way an appellate court can be satisfied that the child, indeed, understood the meaning of an oath, where the evidence has been received under oath, or is sufficiently intelligent and understands the importance of telling the truth, where the evidence is received not on oath, is by looking at the answers given by the child during voir dire examination. It is important to restate that the purpose of a voir dire examination is twofold. First, is to establish whether the witness understands the meaning of an oath, and secondly, even if the witness does not understand the meaning of an oath, to assist in determining whether the witness is possessed of sufficient intelligence so as to be able to adduce meaningful evidence and whether the witness appreciates the importance of telling the truth. If the answers given are not part of the record, an appellate court cannot determine the correctness or otherwise of the determination of the trial court on the witness' competency to testify, more so where the competence of the witness is under attack. In this appeal, however, we have no difficulty ascertaining that although MM was a child of tender years, her testimony was clear as to what was done to her on the material day. The error on the part of the trial magistrate notwithstanding, we note that the appellant was accorded an opportunity to cross-examine the minor, as required by the law, but he declined to ask her any questions. We think that the trial magistrate's mistake, though one that should be frowned upon, was not prejudicial to the appellant. Our foregoing conclusion is backed by the previous holding by the Court in Thomas Mwambu Wenyi v Republic [2017] KECA 756 (KLR) thus:

> "The reasoning in the case law highlighted above, is that although it is desirable that the questions put by the court on the one hand and the responses of the minor (s) thereto on the other should be reflected on the record during the voir dire examination of minor witnesses the failure to do so is not per se fatal to the prosecutions' case, so long as there is

demonstration on the record that the trial court bore the need to carry out this exercise in mind, and in fact did carry it out. We therefore find no fault in the conclusion reached by the learned Judge that no prejudice or miscarriage of justice was occasioned to the appellant by the trial court's failure to reflect on the record both the questions put by the court to the minor (s) and the responses made by the minor (s) thereto in response to those questions."

14. Turning now to the question whether the offence was proved, we commence by referring to the test in Karingo & 2 Others v Republic [1982] KECA 23 (KLR) that on a second appeal, the question that ought to be asked by the Court is whether there was any evidence on which the trial court could find as it did. In respect of the charge of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* that the appellant faced, the prosecution was required to establish that the victim was aged eleven years or less, that there was penetration of her genital organ and that the person who committed the act was none other than the appellant.

15. The first element of the offence of defilement is age. The Court addressed the manner in which the age of a child can be proved in Peter v Republic [2024] KECA 1124 (KLR) as follows:

> "From the foregoing, it remains settled that the age of the victim can be proved not only by way of documentary evidence such as birth certificate, baptism card or an age assessment report, but also by way of oral evidence of the child who is considered sufficiently intelligent or even the evidence of the parents or guardians."

16. We associate ourselves with that statement of the law. Even though the appellant did not challenge proof of age, we find it prudent to clear the air on this. It is true that no birth certificate or age evaluation report was produced as evidence to prove the complainant's age. However, the complainant stated that she was in nursery school. The trial court also noted that the minor was a child of tender years. Dr. Mibei in section C of the P3 form estimated the complainant's age as 4 years. It must be appreciated that the doctor was, by virtue of his training, qualified to estimate the age of a human being. The appellant did not challenge this evidence of age, and the record shows that he told the trial court that he had no questions for the child. We therefore find that the age of the victim was proved to the required standard.

17. Regarding penetration, the principles surrounding proof of penetration in sexual offences were aptly captured by the Supreme Court of Uganda in Bassita v Uganda SC Criminal Appeal No 35 of 1995, as cited with approval by the Court in Muguanah v Republic [2023] KECA 828 (KLR), thus:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.

18. In this case, the complainant gave an account of what took place in the appellant's house. The mother of the child and a neighbour assessed the minor prior to taking her to the hospital and indeed confirmed that she had a whitish pus-like discharge from her vagina. The investigating officer also testified that she assessed the minor and saw the discharge before referring her for medical attention. On his part, Dr. Mibei produced a P3 form filled with the aid of treatment notes from Mtito Andei Health Centre and his own observation, wherein he confirmed that the minor had been defiled. Incidentally, both the child and the appellant were found to be suffering from a similar strain of STI. This evidence

corroborated and confirmed that the complainant was defiled. In the circumstances, there is no basis for departing from the concurrent findings of the two courts below that the child was penetrated.

19. Was the appellant the offender? To answer this question, it is imperative to appreciate that sexual offences are ordinarily committed in secrecy. This, perhaps, explains why the Legislature, through the proviso to section 124 of the *Evidence Act*, permitted conviction in a charge of a sexual offence on the evidence of the victim solely where, for reasons to be recorded, the court is satisfied that the victim is telling the truth. The complainant knew the appellant quite well. On her part, A.N. testified that the appellant was her brother. The complainant was, therefore, the appellant's niece. The appellant did not challenge MM's evidence that he did the act to her in his house. When the defilement was discovered, AN recalled a Sunday when the child had disappeared for a long period of time, only to emerge from the appellant's house. The appellant did not challenge this evidence but instead claimed that AN and RK had a grudge against him and that he had an alibi. The alibi did not materialize. During cross-examination, AN testified that she had previously had a disagreement with the appellant after the latter boasted that he had slept with all the women in the KWS camp, though the issue was subsequently resolved. We do not find it probable, and neither is there any evidence to support the claim, that the appellant was a victim of vendetta by the witnesses. Additionally, in considering the appellant's defence, we find that the account of events as narrated by the appellant did not diminish the opportunity of his committing the offence. He was, by his own admission, at the scene of crime at the time the offence was said to have been committed. We, therefore, agree with the conclusion by the first appellate court that it was the appellant, and no one else, who defiled MM.

20. As a result, we find that all the elements of the offence of defilement were proved against the appellant. Consequently, the appeal against conviction is without merit and must fail.

21. Although sentence is a matter of fact and ordinarily does not fall for the determination of the Court on a second appeal, the door to enter the sentencing arena has been opened for us by the fact that the High Court enhanced the appellant's sentence. We must acknowledge from the outset that pursuant to section 8(2) of the *Sexual Offences Act*, the proper sentence for a person found guilty and convicted for defiling a child aged eleven years or less is life imprisonment. In this case, the prosecution put the appellant on notice that it would apply for the enhancement of the sentence. The appellant was informed by the learned Judge of the State's enhancement notice. He confirmed that he understood the import of the notice but elected to proceed with his appeal. The learned Judge, in enhancing the sentence, appreciated the mandatory nature of the sentence. The Supreme Court in Republic v Mwangi (supra), Republic v Ayako [2025] KESC 20 (KLR) and Republic v Manyeso [2025] KESC 16 (KLR) affirmed the constitutionality of the minimum sentences provided in the *Sexual Offences Act* and upheld the constitutionality of life imprisonment. In the circumstances, having found that the High Court procedurally enhanced the sentence to the one provided by statute, we have no reason for interfering with the sentence imposed upon the appellant. We indeed affirm the sentence of life imprisonment.

22. In the end, we find this appeal lacks merit and dismiss it in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2025.

P. O. KIAGE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR