LM v Republic (Criminal Appeal E002 of 2024)
[2025] KEHC 14697 (KLR) (16 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14697 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E002 OF 2024

CW MEOLI, J

OCTOBER 16, 2025

BETWEEN

LM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from original conviction and Sentence in C. M's Loitokitok Sexual Offences Case No. E020 of 2023- Gachuki, RM)

JUDGMENT

1. LM , the Appellant herein was charged in the main count with Incest contrary to Section 20(1) of the Sexual offences. The particulars stated that on 23rd October, 2023 at (particulars witheld) Village in (particulars witheld) Sub-county within Kajiado County, the Appellant intentionally caused his penis to penetrate the vagina of M.N a child aged 13 years who was, to his knowledge, his daughter.

2. The alternative charge was Indecent Act with a child contrary to Section 11(1) as read with Section 11(4) of the *Sexual Offences Act*.

3. Following a full trial, the Appellant was convicted on the main count and sentenced to serve 30 years imprisonment. Aggrieved by the outcome he filed the present appeal via his Amended Petition of Appeal raising the following grounds:

    a. That the Learned Trial Magistrate erred in law and fact by convicting and sentencing me yet the case is replete with a colossal number of inconsistencies and contradictions.

    b. That the Learned Magistrate erred in law and fact by convicting and sentencing me yet the witnesses were incredible.

c. That the Learned Trial Magistrate erred in law and fact in failing to appreciate that penetration, a key ingredient of the offence was not proved.

d. That the Learned Trial Magistrate erred in law by failing to appreciate the fact that crucial witnesses were not brought to court.

e. That the learned trial magistrate erred in fact by failing to see and appreciate that this is a case of clear frame up.

f. That the sentence is harsh and excessive.

4. The Appeal was canvassed by way of written submissions. Asserting contradictions and inconsistencies in the prosecution evidence, the Appellant contended that while the date of the offence in the charge sheet was 23.10.2023 the complainant minor and her mother testified that she was defiled on four occasions by the Appellant. Thus, in his view, the charge sheet was defective and he should be acquitted.

5. In assailing the evidence of the complainant, the Appellant stated that it was inconceivable that he defiled the minor in the same bed shared by the minor and her brothers. And that if that were the case, the said brothers would have heard the commotion and woken up.

6. He further pointed out alleged procedural irregularities, specifically that the doctor testified before the minor's evidence was taken despite the doctor's role being to corroborate the minor's testimony. In his view the misstep rendered the doctor's evidence inadmissible under Section 111(1) of the *Evidence Act*. Here citing several authorities, including MTG -vs- Republic KEHC 189 (eKLR). He also cited the Court of Appeal Criminal Appeal No 76 of 2012- Phillip Muiruri -vs- Republic.

7. In relation to the second ground, the Appellant charged that the prosecution witnesses were not credible, and citing the case of Kimani Ndungu- vs- Republic [1979] KLR 282. For the proposition that "a witness whose evidence it is proposed to rely should not create an impression in the mind of the court that he/she is not a straight forward person or raise suspicion about his/her trustworthiness or do or say something which indicates that he/she is a person of doubtful integrity and therefore unreliable which makes it unsafe to accept his/her evidence."

8. Asserting that the medical report tendered was inadmissible due to the fact of its production before the complainant testified, the Appellant argued that penetration was not proved. More so as samples taken from him were not subjected to any test.

9. In supporting his fourth ground, he contended that crucial witnesses including the complainant's brother who was allegedly present during the offence and two neighbours, Agnes and Leah who were mentioned by the complainant's mother, were not called by the prosecution. He submitted concerning the 5th ground that the charges against him are a frame up by the minor and her mother.

10. Finally, the Appellant took issue with the life sentence imposed by the trial court and translated to 30 years on the authority of the decision of the Court of Appeal in Ayako v Republic (Criminal Appeal 22 of 2018) [2023] KECA 1563 (KLR). Citing the decision in Criminal Appeal No. 84 of 2015 Joshua Gichuki Mwangi v Republic (unreported), the Appellant asserted that pursuant to Article 50 of *the Constitution*, he ought to have benefitted from the least severe punishment which in this case would be 10 years.

11. Despite being accorded the opportunity to file submissions, the State did not file any submissions.

Analysis and Determination

12. On a first appeal, the court is duty bound to re-evaluate the evidence adduced before the trial court and make its own independent conclusions while bearing in mind that it has neither heard nor seen the witnesses testify. See Pandya v R (1957) EA 336; Ruwalla v R (1957) EA 570 and David Njuguna Wairimu v. Republic (2010) eKLR .

13. In the latter case, the Court of Appeal observed that:

> '' The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.''

14. Having considered the record of appeal as well as the submissions by parties, I discern the issues falling for determination to be whether the offence of incest was proven to the required standard and whether the sentence meted by the lower court was harsh and excessive.

15. The prosecution case through three witnesses was as follows. M.N (PW2), the complainant who was aged thirteen years in the material period was residing at (particulars witheld) , Loitokitok with her father and mother who are the Appellant and Juliet Wanjiru (PW3), respectively. On the night of 23.10.2023 PW2, her mother PW3 and her younger brothers were at home. The Appellant having come home at 11.00pm started a fight with PW3 who left the house to spend the night at a neighbour's house.

16. According to PW2, the Appellant closed the door to the house and remained in the sitting room while the children went to sleep in the bedroom, sharing one bed. Soon, the Appellant joined the children, squeezing himself among them, and when PW2 woke up, the Appellant forcefully took her to the sitting room where he ordered her on pain of a beating, to undress and lie on the seat. When she complied, he then lay on top of her and inserted his penis into her vagina before ordering her to go back to bed as he remained in the sitting room.

17. Early on the next morning when PW3 returned tried to come back into the house, the Appellant refused to open the door and PW3 went away. However, as the children headed to school, they met PW3 to whom PW2 narrated the events of the previous night. PC Peter Okumu (PW4) of Loitokitok Police station to whom the incident was thereafter reported, in the company of Cpl. Gitonga, proceeded to the Appellant's house where he was found asleep. The Complainant's clothes were also recovered.

18. The Appellant was arrested and with PW2 escorted to the police station. PW2 was treated at the Loitokitok Sub-County hospital. It was found that not only was her hymen broken, she had a bruise on the 9 o'clock of her labia majora. In addition to a whitish discharge in the vagina, PW2 had epithelial cells suggesting trauma in the vaginal area. No spermatozoa were noted. Dr.Anthony Munguti (PW1) of Loitokitok sub-county hospital produced the PRC form, lab report, treatment sheet and P3 form in respect of the medical examinations as Exh. 1 to 4.

19. Upon being placed on his defence the Appellant elected to give an unsworn statement, to the following effect. The charges against him emanate from false accusations by his wife due to their protracted

disagreement and dispute and that he never intended to ''to do such a thing to (his) daughter''. He said that his wife's motivation was to illegally take over his land.

20. Section 20(1) of the *Sexual Offences Act* creates the offence of incest as follows:-

> " Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than 10 years:
>
> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.''

21. In this case, there was no dispute that the Appellant and PW3 were a married couple, that PW2 was their daughter in addition to two other younger children. Equally, the age of the Complainant was not in dispute; she testified that she was aged 13 years at the time of the offence while her mother testified that PW2 was born on 12.01.2010, and her birth certificate confirming this fact was produced as Exh. 7. The evidence clearly showed that PW2 was aged 13 years at the time of the offence. In Elias Kaingu Kasomo vs Republic (2014) eKLR, the Court of Appeal stated thus:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".

22. In the case of Mwalongo Chichoro Mwanjembe v Republic, Msa Cr.App. No. 24 of 2015 (UR) the Court of Appeal addressed the question of age of complainants in defilement cases as follows ;-

> " ...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..."

23. Regarding proof of penetration the prosecution relied on the testimony of PW2 and the medical evidence tendered. PW2 gave a detailed account of the events of the material night and how the Appellant having pulled her out of the shared bed forced her to the sitting room, to undress, and lie on a seat before inserting his "kitu ya kukojoa" into her vagina. Thereafter ordering her back to the shared bed. She identified the clothes she had worn on the material night as the pink trousers marked as Exh.5 and white panty with orange lining Exh. 6 .

24. PW2 did not falter during cross-examination, rejecting claims by the Appellant that she had been conscripted by her mother in a conspiracy to falsely implicate the Appellant. She reiterated that her brothers were present at home after her mother left and denied that the Appellant also left the house on the material night after the fight, returning on the next morning. In setting the record straight, she stated that the Appellant had only briefly stepped out of the house and later returned to ask her to let him in, which she did.

25. Her evidence was strongly corroborated by the evidence of the doctor, PW1 who examined the minor on the day after the incident and the findings were recorded in Exh. 1 - 4. The findings were that her hymen was broken, a bruise on the labia majora and although no spermatozoa was noted, the presence of epithelial cells according to the doctor is suggestive of trauma in the vaginal area.

26. The evidence by PW3 is that on the next day after she sought refuge in her friend's house for the night, she met PW2 and her brothers while headed to school and PW2 narrated to her the events of the previous night. She too reiterated that after the fight she left the Appellant in the house, and spent the night at her friend's house and upon meeting PW2 on the next day, she reported the defilement to her. She denied falsely implicating the Appellant.

27. The fact that PW3's friends were not called as witnesses does not in any way diminish the weight of evidence by PW1 -3. These friends did not witness the incident in question as they were apparently in their homes on the material date. They would probably only have narrated what they heard from PW3 or her daughter on the next morning. The younger brothers of the Complainant were asleep in the bedroom, while according to PW2, the offence occurred in the sitting room, and whether or not they heard what transpired is unknown.

28. There is no requirement to call any number of witnesses in proving any fact in issue. Section 143 of the *Evidence Act* Cap 80 Laws of Kenya provides that no number of witnesses is required to prove any fact. The predecessor of the Court of Appeal stated in Bukenya and others vs Uganda [1972] EA 549 that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; second, that the court has the right and the duty to call witnesses whose evidence appears essential to the just determination of the case; and third, that where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

29. In Keter versus Republic [2007] 1EA135 the court observed that:-

> " The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

30. The claim by the Appellant that it was inconceivable for him to have intercourse with PW2 in the same bed shared by the brothers and for them not to witness the same appears misplaced. The Complainant maintained that she was led by the Appellant from the bedroom to the sitting room and after the assault ordered back to the bedroom, while the Appellant remained in the sitting room. The discrepancies cited here by the Appellant appear to be based on his misapprehension or deliberate distortion of the evidence by PW2

31. While the dicta in Kimani Ndungu'u Vs R (supra) still holds true, not every inconsistency or contradiction is fatal to the prosecution case. In Keter versus Republic (supra) the court held inter alia that;-

> " Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused"

32. Further in Joseph Maina Mwangi versus Republic Criminal Appeal No.73 of 1993 the Court of Appeal held that:

> " In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."

33. Indeed, under the proviso to Section 124 of the *Evidence Act*, the trial Court was entitled on the basis of recorded reasons, to act on the uncorroborated evidence of PW2 if the court believed her. Here, ample corroboration was supplied to shore up the evidence of PW2. Equally, there is no stipulated order by which witnesses ought to be called during a trial, as suggested by the Appellant. Inasmuch as a logical sequence of witnesses is desirable, witnesses testify when they become available . Corroborative evidence can be adduced at any time in the trial, whether before or after the evidence of the main witness.

34. Further, nothing turns on the Appellant's submission that the charge was defective because the minor stated that the Appellant had defiled her on three previous occasions. She revealed this to her mother while informing her concerning the latest sexual assault on the material night, concerning which the Appellant was charged. He was specifically charged in respect of the said assault on the material night. It is not inconceivable that a 13-year-old girl living under the roof of perennially fighting parents, and specifically a father given to violence, would fear disclosing sexual molestation by such a father. As often happens, the victim eventually spoke up. The Appellant's allegation that the charges against him were the product of a conspiracy hatched by PW2 and PW3 appear unbelievable especially in light of the medical evidence by PW1, whereas both PW2 and PW3 acquitted themselves well during cross-examination, and were believed by the trial court, whose findings cannot be faulted.

35. The Appellant has also complained that medical samples taken from him were not tested. The Court of Appeal in Chembe v Republic (2024) KECA 647 (KLR) stated as follows:

> " 28. . Notably, section 36(1) of the *Sexual Offences Act*) is couched in discretionary terms, rather than mandatory terms . The above provision was a subject of discussion, by this Court in the case of Robert Mutingi Mumbi -vs- Republic, Criminal Appeal No. 52 of 2014 (Malindi) where this Court stated:
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> "Section 36 (1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly

that provision is not couched in mandatory terms. .....DNA evidence is not the only evidence of which commission of a Sexual Offence may be proved."

29. In the case of David Kahura Wangari vs. Republic [2016] eKLR, this Court held that:

> "There is no requirement for the appellant to be taken for treatment to establish an act of defilement. DNA testing or forensic examination of a perpetrator of any offence is done in the course of investigations, but that is purely the choice of the investigating officers, and failure to do so particularly in this case did not affect the credibility of the evidence that was before the court.

30. And in the case of AML vs. Republic [2012] eKLR, this Court authoritatively stated that, "The fact of rape or defilement is not proved by D.N.A. test, but by way of evidence."

36. The Court of Appeal therefore concluded by stating that:

> "31. In view of the above cited authorities, the conduct of a DNA test is not mandatory and, in the circumstances of this case where the prosecution had satisfied all the elements of the offence of defilement clearly, a DNA test was unnecessary. See Evans Wanjala Wanyonyi vs. Republic [2019] eKLR."

37. This court upon reviewing the evidence at the trial finds that the prosecution evidence proved all the ingredients of the offence preferred against the Appellant, and displaced the Appellant's defence based on alleged frameup by PW2 and her mother. The court could not find any ground upon which to fault the findings by the trial court on these aspects. In the result, the appeal against the conviction must fail.

38. Regarding the sentence, the Appellant complains that it is harsh and excessive. He has referred to several decisions including Evans Nyamari Ayako v Republic Criminal Appeal No. 22 of 2018. Indeed, the trial court having sentenced the Appellant to life imprisonment as prescribed under section 20(1) of the *Sexual Offences Act* proceeded to state that :

> "Going by the latest jurisprudential developments and findings by the Court of Appeal in Kisumu in Evans Nyamari Ayako ....the life imprisonment imposed in this case shall translate to mean 30 years imprisonment. The term shall run as from 24.10.2023 when the Accused was arrested".

39. The proviso to Section 20(1) of the *Sexual Offences Act* provides that a person who commits an offence of incest with a female person aged below eighteen years shall upon conviction be sentenced to imprisonment for life. The jurisprudence in the case of Evans Nyamari and other similar cases emanated from the application of the decision of the Supreme Court in Francis Karioko Muruatetu and Others Versus Republic SC Petition No. 15 of 2015 (2017) eKLR (Muruatetu I).

40. The rationale in the Muruatetu I (supra) has hitherto been applied in many cases involving offences under the *Sexual Offences Act*. Including Christopher Ochieng Vs. Republic (2018) eKLR and Manyeso V. Republic CRA No. 12 of 2021 (2023) KECA 827 (KLR). However, the Supreme Court has recently pronounced itself in Republic Vs. Mwangi and Others Petition No: E018 OF 2023 (2024)

KESC 34 (KLR) as follows, regarding minimum or mandatory sentences prescribed under section 8 of the *Sexual Offences Act*:

> "In any case, the sentence imposed by the trial court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with the sentence."

41. Further, in an appeal to the Supreme Court emanating from the Court of Appeal decision that the Appellant herein has invoked, Republic Versus Evans Nyamari Ayako Petition No: E002 of 2024 the Supreme Court in its judgment delivered on 11th April 2024 stated that:

> "(51) In the instant case, the Court of Appeal in its judgment, referred to the case of Manyeso Vs. Republic case where a different bench of the Court of Appeal cited the Muruatetu I case in stating that the rationale therein applied mutatis mutandis to the issue of mandatory indeterminate life sentence.
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> In Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the Penal Code. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence." (emphasis added).

42. By parity of reasoning, as explained in Muruatetu II case above, the decision in the Muruatetu I and Ayako's case cannot be applied in sentencing an offender convicted under Section 20 (1) of the *Sexual Offences Act*, and this court, like the Court of Appeal in Mwangi's case above, lacks the jurisdiction to reduce the sentence of 30 years imposed by the trial court. Equally, the trial Court had no jurisdiction to award the lawful sentence of life imprisonment and then direct that the actual term translated to 30 years imprisonment. Based on the provisions of Section 20 (1) of the *Sexual Offences Act*, and flowing from the foregoing recent decisions of the Supreme Court thereon, the lawful mandatory sentence for the offence for which the Appellant was convicted is life imprisonment, as correctly awarded by the trial court. Hence, the trial court's further direction translating the sentence to 30 years imprisonment is erroneous and without jurisdiction.

43. This Court will therefore uphold and affirm the sentence of life imprisonment as correctly awarded by the lower court, while setting aside the direction that the said sentence be translated to a term of 30 years imprisonment. It is so ordered. In the result, the appeal has failed in its entirety and is hereby dismissed.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 16TH DAY OF OCTOBER 2025.

C.MEOLI

JUDGE

In the presence of:

For the State: Ms. Kihumba h/b for Mr. Kilunda

For the Appellant:present

Appellant:

C/A: Lepatei