PMM v Republic (Criminal Appeal E033 of 2024)
[2025] KEHC 14726 (KLR) (21 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14726 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E033 OF 2024

KW KIARIE, J

OCTOBER 21, 2025

BETWEEN

PMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. Case No. E042 of 2022 of the Senior Principal Magistrate's Court at Kilungu by Hon. F. Makoyo–Principal Magistrate)

JUDGMENT

1. PMM, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on diverse dates between January 2022 and the 15th day of December 2022, at [Particulars withheld] village in Mukaa sub-county within Makueni County, he intentionally caused his penis to penetrate the anus and the vagina of AMM, a child aged ten years.

3. The appellant was sentenced to serve life imprisonment. He has appealed against both conviction and sentence. He was in person. He raised the following grounds of appeal:

    a. The trial court meted out an excessive sentence for a first offender.

    b. The lower court erred in law and fact by disregarding the appellant's mitigation.

    c. The trial court erred in law and fact by failing to consider that the prosecution's witnesses were inconsistent and their evidence lacked probative value.

    d. The trial court erred in law and fact by neglecting to consider that no DNA test was carried out to establish whether the appellant committed the alleged offence.

4. The state opposed the appeal through Mr. Victor Kazungu, learned counsel, because:

    a. There was sufficient evidence that proved the charge to the required standards.

    b. The sentence was not excessive.

5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their testimonies. Therefore, I will follow the well-known case of Okeno vs Republic [1972] E. A 32 to guide my decision-making process.

6. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

An offence of defilement, therefore, is established against an accused person when the prosecution has proved the following ingredients:

a. That there was penetration of the complainant's genitalia;

b. That the accused was the perpetrator, and;

c. The victim must be below eighteen years old.

This position was echoed in the case of Fappyton Mutuku Ngui vs Republic [2012] eKLR when Joel Ngugi J. said:

> Going by this definition of defilement, I agree with Mr. Mwenda on the issues the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.
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> These are the ingredients that the prosecution must prove against an accused person.

7. The copy of the birth certificate produced as an exhibit indicates that AMM was born on January 1, 2012. As of January 2022, she was 10 years old. The victim's age was proven to meet the required standards.

8. PW1 (AMM) told the court that she was living with her sister and her husband, the appellant. After her sister had left for work, the appellant ordered her cousins to tend to the livestock and instructed her to wash the dishes. When her cousins left, the appellant grabbed her, removed her underwear, and inserted his penis into her genitalia. She experienced pain and bled. When she asked him to stop, he slapped her face. We threatened her not to tell anyone, or else he would kill her. Following this incident, he continued to defile her every month until December. After the December defilement, she reported it to her sister.

9. For a child of this age, when she talks of several instances of defilement, one wonders why there were no obvious signs. These signs could not have escaped the notice of those who stayed with her. Jessicah Ngina Mutisya (PW2), her sister who stayed with her, testified to noticing that the complainant appeared sad. In the case of Ben Maina Mwangi v Republic [2006] eKLR Lesiit, J. (as she then was) observed:

> Bearing in mind she was a child of tender years being only 4 years at the time, for the offence to be proved there should have been evidence adduced to show that the Appellant used some

force on her or something tending to show an assault or infliction of pain. At least some evidence needed to be adduced from which it could be construed that defilement took place. Considering the Complainant's age as compared to the Appellant, if any attempt were made to penetrate the Complainant's private parts it would be expected that the Complainant must have felt pain, if not excruciating pain. There is no way the Complainant would forget the experience or that detail in her evidence.

10. In this case, I would have expected PW2 to have noticed some abnormality in the walking of the complainant way back before the report was made to her in December.

11. The medical evidence that was adduced by Frankline Musembi, a clinical officer based at Sultan Hamud sub-county Hospital, raised some reasonable doubts. The complainant was examined on the 17th day of December 2022. His findings were that she did not have any physical injuries. The labia majora and minora were intact. The only positive finding was a broken hymen, but it was not recent.

12. A child of 10 years to be defiled by an adult, there must be tell-tale signs. A broken hymen cannot be the basis in this case to conclude that she was defiled. The Court of Appeal in in the case of PKW vs Republic [2012] eKLR. The court observed as follows:

> " 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified" Is hymen only ruptured by sexual intercourse.
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> 16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it, like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769."

13. The upshot of the preceding analysis of the evidence is that the conviction was unsafe. I quash the conviction, set aside the sentence, and set the appellant at liberty unless lawfully held.

DELIVERED AND SIGNED AT MAKUENI, THIS 21ST DAY OF OCTOBER 2025

KIARIE WAWERU KIARIE

JUDGE