AEM v Republic (Criminal Appeal E061 of 2024)
[2025] KEHC 14761 (KLR) (16 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14761 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E061 OF 2024

CW MEOLI, J

OCTOBER 16, 2025

BETWEEN

AEM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from conviction and sentence in Kajiado CM's Court Sexual Offence Case No. E029 of 2021 - B. Cheloti, SRM)

JUDGMENT

1. AEM, the Appellant herein was charged in the main count with Defilement contrary to Section 8 (1) as read together with section 8(3) of the *Sexual Offences Act*. The particulars of the charge stated that on diverse dates between 15.11.2020 and 19.12.2020 at (particulars withheld) location, (particulars withheld) sub-county within Kajiado County, he intentionally and unlawfully caused his penis to penetrate the vagina of V.K.W a child aged 14 years. In the alternative count, he faced a charge of Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. Following a full trial, the Appellant was convicted and sentenced to serve 20 years imprisonment. Aggrieved by the conviction and sentence he filed the present appeal via his undated memorandum of appeal raising the following grounds:

    a. That the Trial Magistrate erred in matters of law and fact by failing to analyze and evaluate the whole evidence and come to her own independent conclusion as required by law.

    b. That the Trial Magistrate erred in matters of law and fact in convicting the appellant on the evidence, which was so contradictory and dangerous to convict on such evidence.

    c. That the Learned Trial Magistrate erred in law and fact in failing to find that the charge I was charged with was defective in nature contrary to Section 214(1) of the CPC.

d. That the Trial Magistrate erred in law and fact in failing to find that, essential elements in a case of defilement were not proved.

e. That the trial magistrate erred in matters of law and facts in failing to give reasons of dismissing the appellant's unrebutted alibi defence as required under Section 169(1) of the C.P.C.

f. That the Trial Magistrate erred in matters of law and fact in convicting the appellant on the evidence that fell below the required standard of law.

3. Upon the directions of the court, the Appeal was canvassed through written submissions. The Appellant filed his submissions dated 20th November, 2024 highlighting three issues.

4. On the first issue, he contended that the prosecution failed to prove penetration as the medical evidence did not support penetration. It was his argument that the testimony of PW1 was inconsistent, unreliable and did not provide sufficient corroborative detail to establish the act of defilement. He relied on the case of Njoroge -vs- Republic [1982] KLR 388 and Musa Nyandoro -vs- Republic [2005] eKLR, in asserting that the prosecution case did not attain the required standard of proof beyond reasonable doubt, given inconsistencies in the complainant's testimony.

5. Secondly, the Appellant faulted the trial court for placing undue reliance on the DNA report as the basis for convicting the Appellant. Stating that while the DNA test confirmed biological paternity, it did not establish the circumstances of the defilement. He argued that there were inconsistencies in the timeline of events and delay in reporting the alleged offence, which undermined the credibility of the testimony of PW1's evidence. On this score, he cited the case of J.G -vs- Republic [2017) eKLR.

6. As regards the sentence he termed it as disproportionate to the offence. And complained that the trial court did not consider mitigation factors, including the fact that he was a first-time offender and showed remorse. He urged that the sentence ought to be reduced. Citing the case of S -vs- Attorney General [2012] eKLR. On the authority of Kenyatta -vs- Republic [2018] eKLR, the Appellant attacked the mandatory sentence, which he described as harsh and excessive and in in violation of Article 160 of *the Constitution*.

Respondent's submissions.

7. By their submissions dated 4th June, 2025, the Respondent addressed two main issues, namely, whether the prosecution prove its case against the Appellant to the required standard, and, whether the appellant's defence received due consideration.

8. Reiterating the ingredients of the offence of defilement including penetration, proof of age and identification of the offender, the prosecution submitted as follows. It was their case that penetration was proven by the testimony of PW1 to the effect that that on the material Sunday the Appellant called her into the house to serve him food; that when she entered the house the accused locked the door and gagged her mouth with some clothes; and then pushed her onto the bed and using force inserted his penis into her vagina. She narrated that the Appellant similarly defiled the second time when he went to their home and on a third occasion when she came home from catechism. And as a result, she conceived. The prosecution cited the medical reports and tests, which corroborated the evidence of the victim, since she was pregnant.

9. The prosecution reiterated evidence regarding the age of the complainant as confirmed by the birth certificate of the minor, which showed that she was born on 29.9.2027. As for identification, underscored the fact that the Appellant was identified by the complainant and her mother as her stepfather who at the material time had cohabited with the victim's mother for a period of 2 months

and therefore not a stranger to the victim. Thus, according to the prosecution, all the ingredients of the offence had been established.

10. They submitted that they proved the ingredients of the offence and the trial court properly convicted the Appellant.

Analysis and Determination

11. The grounds of appeal revolve around contradictions in and insufficiency of the prosecution evidence, the trial court's alleged failure to consider the defence of the Appellant and the sentence which the Appellant views as harsh.

12. The prosecution called five witnesses. Following a voire dire examination of V.K.W, the trial court found that the minor was intelligent enough and she understood the importance of telling the truth as well as the meaning of an oath. She therefore gave sworn testimony. Testifying as PW1, V.K.W stated that she was 14 years old and lived with her mother and grandmother. She stated that on Sunday the Appellant who was then cohabiting with her mother Peris Wanjiku (PW2) asked her to serve him food, and she therefore entered the house. Whereupon the Appellant closed the door, gagged her mouth with some clothes, removed her underwear and pushed her to the bed before inserting his penis into her vagina. That she attempted to resist in vain, and he then threatened her that if she informed anyone about the incident he would slaughter her.

13. She also stated that he repeated the sexual assault a second time when the Appellant came to her home. And on a third occasion on 19.12.2020 when the witness returned from catechism classes and the Appellant finding her at home, defiled her once again. She explained that her mother was a casual labourer who ordinarily went out to work, and that when she missed her periods, she realized she was pregnant. Because she was afraid to inform her mother, she confided in her head teacher. She said she had no disagreement with the Appellant.

14. PW2 testified that she was the mother of PW1, and at the material time cohabiting with the Appellant as husband and wife since September 2020. She said that on 21.5.2021, the head teacher of her daughter's school, one Mrs. Mutuku summoned her to PW1's school where she was informed that PW1 had been defiled by the Appellant and that she was pregnant. That PW1 later confirmed the information and was examined at Makindu District Hospital and Masimba Health Centre following a report made to the police on 27.5.2021.

15. David Mwenda (PW3), a clinical officer at Masimba Health Centre testified that PW1 had been examined and treated on 27.5.2021 and 22.6.2021 and it was confirmed that she was 6 months pregnant. Examinations revealed that her hymen was broken and she had whitish discharge per the P3 form completed at Masimba Health Centre. The relevant treatment notes were produced as EXh.2(a) and 2(b). The PRC form and P3 form were produced as exhibit 3 and 4 respectively. Both the Exh. 3 and 4 contain findings that PW1 was mentally challenged.

16. The fourth witness was PN (PW4). The total sum of her testimony was that she was a teacher at (particulars withheld) School where PW1 was a pupil. She said that having noticed some changes in her bodily appearance early in May 2021, she questioned her. That PW1 then narrated to her that the Appellant had defiled her but she had not informed anyone because she feared that the Appellant would harm her. PW4 thereafter notified the headteacher who communicated the information to PW1's grandmother.

17. Lucy Mwangi (PW5) the investigating officer testified that she received instructions on 26.5.2021 from her superior, Inspector Nyembu to investigate a case of defilement that had occurred on 16.11.2020,

17.11.2020 and 19.12.2020. Having summoned PW1 and her mother, she escorted the minor to Masimba Health Centre where she was confirmed to be pregnant. She subsequently charged the Appellant whom PW1 identified as the assailant. She stated that PW1 delivered a child on 28.9.2021. The record shows that on 6.10.2021, the trial Court ordered for DNA samples be taken from the Appellant, PW1 and her newborn child, named D. A report dated 14th December 2021 prepared by Margaret W. Maina, a government analyst was filed. It indicates a probability of 99.99+ % that the Appellant was the father of PW1's child, D.

18. When the Appellant was placed on his defence, he elected to give unsworn evidence to the following effect. That he and PW2 were lovers, having met in 2020 and that he sold her his motorcycle in 2021 and that is what caused problems between them. He left her in May 2021. He denied committing the offence.

19. The court has considered the evidence adduced in this case. Three key elements, namely, the age of the victim, penetration and identity of the perpetrator must be proved beyond reasonable doubt for the prosecution to succeed in a charge of defilement. The prosecution bears the burden of proof beyond reasonable doubt. This burden of proof never shifts to an accused person.

20. In proof of these ingredients, the prosecution relied on the evidence of five witnesses. The star witness was PW1. Following a voire dire examination the trial court received her sworn evidence. The age of the minor was proved through the birth certificate produced as Exh.1, which showed that she was born on 29.09.2007. Her age at the material time was shown to be 14years. PW2 also testified that PW1 was aged 14 years in the material period. That evidence was not seriously challenged and appears credible.

21. In Mwalongo Chichoro Mwanyembe -vs- Republic, Mombasa Criminal Appeal No. 24 of 2015) (UR) cited in the case of Edwin Nyambaso Onsongo -vs- Republic (2016) eKLR, the Court of Appeal 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 documents, 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". "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".

22. Concerning penetration there was evidence by PW2 that she lived with the victim and her own mother, and that between the month of September and December 2020, the Appellant and herself were lovers and cohabiting in that home. The evidence of PW1 relates three separate experiences of sexual assault by the Appellant. And no doubt because of her mental challenges, PW1 only stated one date, that is 19.12.2020 being the date of the last incident. She described in detail the first experience when the Appellant asked her to serve him food, and on entering the house, he closed the door, gagged her mouth, undressed her, pushed her on the bed and inserted his penis into her vagina. And thereafter warned her not to reveal the incident to anyone, or she would be "'slaughtered". This happened on two other occasions, and when she missed her menstrual periods, she realized that she had conceived.

23. This witness gave a lucid account of the events and her evidence is confirmed by her teacher (PW4) who also noted her state, as well as medical reports Exh. 2-4 that show that as of May, 2021 PW1 was six months pregnant, indicating the date of conception to be around November/December 2020. She indeed subsequently gave birth in September 2021.

24. The DNA report by the government analyst on the record appears to have been filed without the maker giving evidence. The report indicates that the Appellant was 99.99+% the likely father of the child born to PW1. He asserts in his submissions here that there was still the probability that a different person sired PW1's child. Such possibility appears statistically remote. Be that as it may, even if the DNA

results were excluded, there is strong corroboration of penetration in the medical records produced by PW3.

25. Equally, there is no dispute that the Appellant was in the material period in a relationship and cohabiting with the mother of PW1. He was therefore known to PW1 and had opportunity to be around her home in the material period. He did not cross-examine PW1 during her evidence, but it is difficult to see how his alleged souring relationship with PW2, after May of 2021 would have influenced PW1 to falsely implicate him for a past event, as suggested. From his evidence, the fallout if at all, happened in May 2021 after PW2 learned about the sexual assaults on the daughter and the fact that she was pregnant. According to PW2 the Appellant then went underground and was only traced and arrested sometime later by police.

26. Upon its own review of the evidence, the court is persuaded that the ingredients of the age of the complainant and penetration were proved, and further that the Appellant was not only identified as the perpetrator, but also as the father of PW1's child. His denials were displaced by the prosecution evidence and his defence was displaced properly dismissed. The conviction was proper, and his appeal against the conviction is without merit.

27. The appellant has stated that the sentence of 20 years imprisonment is harsh and excessive. Section 8(3) of the *Sexual Offences Act* provides that:

> ''A Person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.''

28. The sentence is mandatory, and the court has no discretion. In its recent decision in Republic Vs. Mwangi and Others Petition No: E018 OF 2023 (2024) KESC 34 (KLR) the Supreme Court stated as follows, regarding minimum and 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."

29. Further, in Republic v Evans Nyamari Ayako Petition No: E002 of 2024 the Supreme Court in its judgment delivered on 11th April 2024 stated that:

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> "(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."

30. Similarly, in this case, the sentence awarded by the trial court was lawful. And this Court has no jurisdiction to interfere with the prescribed mandatory sentence. Hence, the appeal regarding sentence must equally fail. In the result, the entire appeal is without merit and is hereby dismissed.

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

C.MEOLI

JUDGE

In the presence of:

Appellant: present

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

C/A: Lepatei