DMM v Republic (Criminal Appeal E037 of 2024)
[2025] KEHC 15274 (KLR) (29 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15274 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E037 OF 2024

AN ONGERI, J

OCTOBER 29, 2025

BETWEEN

DMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. D. Wangeci (SPM) in Wundanyi Sexual Offence Case No. E016 of 2023 delivered on 22nd August 2024)

JUDGMENT

1. The Appellant DMM was charged alongside JMZ (a minor) who declined to appeal his conviction and sentence with the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence are that on 31st May 2023 at 1600hours at Mwatate Sub County within Taita Taveta County, the Appellant in association with others intentionally caused his penis to penetrate the anus of MD a child aged five (5) years.

3. The Appellant was charged with an alternative charge of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006 in that on the same material particulars as in Count I above, the Appellant intentionally touched the anus of MD, a child aged five (5) years old with his penis.

4. The Appellant pleaded not guilty to the charges and the prosecution called five (5) witnesses.

5. The prosecution evidence in summary was that the complainant's mother who was working as a cook at Mwashume Primary School said the complainant used to drop his bag at the kitchen after the other students had left and he would proceed to play with his friends while waiting for her to finish up.

6. On the material day, the complainant dropped his bag outside the kitchen and left.

7. On their way home PW1 noticed that the complainant was walking with a strain. She demanded an explanation and when the complainant started crying, she carried him and he told her that the Appellant had taken him behind the classrooms and asked him to remove his shorts and he told him to bend down and he had inserted his penis into the complainant's anus.

8. All this happened in the presence of the second minor who wiped the complainant's tears and helped him to wear his trousers.

9. On 2nd June 2023, the complainant was taken to the nearest health care centre since 1st June 2023 was a holiday.

10. The matter was reported to the police and the two minors were arrested.

11. Upon examination, one side of the complainant's buttocks was found swollen on the right side.

12. PW5 WILLIAM SIGEI who examined the complainant at Mwatate Sub County Hospital said he noted that there were no injuries on the anal opening save for a swelling on the right buttock. PW5 classified the degree of injury as harm.

13. In his defence, the Appellant who denied commission of the offence said he was in school the whole day on 31st May 2023 and that he left at 5:30p.m.

14. He said at the time of the alleged offence he was in class with their teacher Mr. Mwambura for their English lesson.

15. The birth certificate of the complainant was produced and it confirmed he was born on 3rd August 2017.

16. The trial court found that the prosecution had proved the guilt of the Appellant and his co-accused to the required standard.

17. The Appellant was sentenced to 30 years imprisonment for gang defilement contrary Section 30 of the *Sexual Offences Act* No. 3 of 2006.

18. The Appellant's co-accused was committed a borstal institution for 3 years.

19. The Appellant has appealed to this court against the sentence and conviction on the following grounds:-

    i. That the learned trial Magistrate erred both in law and facts by failing to evaluate and find that the Appellant was not served with the charge sheet and first initial report under Article 35(1) (b) and also Article 50(g) (h) were violated by the same court.

    ii. That the learned trial Magistrate erred in law in failing to consider that the charges as preferred was not proved more so in light of the improbative and uncorroborated medical evidence rendering the whole charge in disarray again occasioning a serious prejudice.

    iii. That the learned trial Magistrate further erred both in law and facts by failing to notice that DNA report should be the final resort of this matter. Failure for the prosecution to prove their own case with the DNA report occasioned a miscarriage of justice.

    iv. That the Appellant's statement in defence was not considered contrary to Section 169 of the criminal procedure code.

    v. That and without prejudice to the instant appeal, the sentence as meted remains harsh and manifestly excessive in the circumstances.

vi. That the learned trial Magistrate erred in law and fact in failing to consider that the appellant as charged herein was and is a minor by jailing him in a Maximum Prison which is a miscarriage of justice.

20. The parties filed written submissions as follows; The Appellant submitted that he seeks to overturn his conviction and sentence on three primary grounds.

21. Firstly, the Appellant argues that his imprisonment constitutes a gross violation of his fundamental rights as a youth. He was arrested at 17 and convicted upon turning 18.

22. The submission contends that an 18-year-old male lacks the maturity and reasoning capacity of a female of the same age and is particularly vulnerable in a maximum-security prison environment.

23. It is argued that detaining him with adult recidivists exposes him to exploitation, harmful practices, and homosexual acts which he is ill-equipped to overcome, thereby infringing upon constitutional protections for children and youth.

24. These include the principle that detention of a child must be a measure of last resort, for the shortest appropriate period, and in conditions that account for the youth's age and sex, as enshrined in *the Constitution*.

25. The submission pleads for an alternative form of custody to rescue him from the current perilous environment.

26. Secondly, the Appellant challenges the sufficiency and credibility of the evidence proving the offence. The core of this argument is that the testimony of the five-year-old complainant is inherently unbelievable.

27. The submission expresses surprise that the alleged anal penetration did not cause the child to scream loudly or exhibit immediate, noticeable distress to his mother, whom he met right after the incident.

28. The fact that the child did not initially report the assault and that there is no record of him seeking medical treatment for his injuries is presented as casting serious doubt on the prosecution's narrative.

29. The Appellant submitted that the case was a fabrication and that the evidence should be disregarded entirely.

30. Thirdly, and stemming from the second ground, the Appellant contends that the prosecution failed to meet the requisite standard of proof beyond a reasonable doubt.

31. It is argued that the trial court's analysis was hasty and contained lapses, failing to thoroughly test and evaluate the evidence. Had a more rigorous standard been applied, a different conclusion would have been reached. Consequently, the conviction is unsafe and cannot stand.

32. In conclusion, the Appellant prays that the appeal be allowed, the conviction quashed, the sentence set aside, and he be set at liberty.

33. The respondent submitted that the trial court's decision to convict and sentence the appellant to 30 years for gang defilement was just and soundly based on evidence proving guilt beyond a reasonable doubt.

34. The prosecution's case was compellingly established through the testimony of five witnesses.

35. The minor complainant (PW3) gave a solid and unshaken account of being sodomized by the appellant, a schoolmate, who acted with an accomplice and subsequently threatened him into silence.

36. The incident was uncovered when the complainant's mother (PW1) noticed his altered gait and a wound, leading to his confession and the subsequent report to the head teacher (PW2) and police.

37. While the clinical officer's examination (PW5) noted no anal injuries, the trial court rightfully relied on Section 124 of the *Evidence Act* to convict based on the minor's credible testimony, which was corroborated by the immediate disclosure and the confirmed age of the victim as five years old.

38. The appellant's defense failed to dismantle the prosecution's case, and as the state conclusively proved all elements of the offence, the respondent prays for the appeal to be dismissed and the trial court's judgment upheld.

39. This being a first appeal, this court has a duty to re-evaluate the case and subject the evidence on record to a fresh and exhaustive examination, weighing the conflicting evidence and drawing its own conclusions, while bearing in mind that it did not have the opportunity to see and hear the witnesses testify.

40. This principle was aptly stated in the case of Okeno vs. Republic [1972] EA 32, where the Court of Appeal for East Africa held that a first appellate court must itself weigh conflicting evidence and draw its own conclusions, though it should make allowance for the fact that it has not seen the witnesses.

41. This court has carefully considered the record of appeal, the submissions by the Appellant and the Respondent, as well as the grounds of appeal.

42. The key issues for determination in this appeal are as follows;

    i. Whether the prosecution proved its case beyond reasonable doubt.

    ii. Whether the Appellant’s defence was properly considered, and

    iii. Whether the sentence was lawful and appropriate.

43. On the first issue regarding the proof of the offence, the Appellant contended that the evidence was insufficient and that the testimony of the minor complainant was inherently unbelievable.

44. That the offence of defilement, and specifically gang defilement under Section 10 of the *Sexual Offences Act*, requires the prosecution to prove the age of the complainant, penetration, and the identity of the perpetrator.

45. Further, that the birth certificate produced as an exhibit confirmed that the complainant was five years old, thus establishing the first element.

46. On penetration, the complainant (PW3) gave a clear and consistent account of how the Appellant, in association with another, took him behind the classrooms, made him remove his shorts, and inserted his penis into his anus.

47. That the immediate aftermath of the incident was corroborated by his mother (PW1), who noticed he was walking with a strain and, upon inquiry, he disclosed the assault.

48. The clinical officer (PW5) found a swelling on the right buttock, which, while not an injury to the anal opening, was consistent with the child’s account of the traumatic event.

49. The trial magistrate rightly invoked the provisions of Section 124 of the *Evidence Act*, which permits a court to convict on the sole and uncorroborated evidence of a victim of a sexual offence if the court is satisfied that the victim is telling the truth.

50. The court record shows that the trial magistrate conducted a voire dire examination and was satisfied that the child understood the nature of an oath and told a consistent and credible story.

51. Further, the lack of a DNA report does not invalidate the prosecution's case, as the law does not mandate such evidence for a conviction where other evidence is sufficient.

52. Regarding the Appellant's defence, he raised an alibi, stating he was in an English lesson with his teacher at the material time.

53. The trial court considered this defence but found it did not displace the strong prosecution evidence.

54. It is trite law that once an accused person raises an alibi, the burden remains on the prosecution to prove its case such that the alibi cannot reasonably be true.

55. In this instance, the prosecution evidence, particularly the direct and credible testimony of the victim who knew the Appellant as a schoolmate, placed the Appellant at the scene.

56. The trial court was therefore justified in rejecting the alibi defence. The Appellant's claim that his defence statement was not considered is belied by the judgment, which explicitly references and evaluates his defence, in compliance with Section 169 of the Criminal Procedure Code.

57. Concerning the Appellant's claim that his rights under Articles 35(1)(b) and 50(g) and (h) of *the Constitution* were violated for not being served with the charge sheet and initial report, the record shows that the Appellant was represented by counsel throughout the trial, pleaded to the charges, and cross-examined prosecution witnesses.

58. There is no indication on record that he was prejudiced in the preparation of his defence, and this ground therefore fails.

59. On the sentence, the Appellant was sentenced to 30 years imprisonment for the offence of gang defilement. The Appellant argues that this sentence is harsh and excessive, and further, that as a person who was a minor at the time of the offence (17 years old), his imprisonment in a maximum-security prison is a miscarriage of justice.

60. The Sentence Review Report filed in the trial court confirms the Appellant was 17 years old at the time of the offence. Section 10 of the *Sexual Offences Act* prescribes a mandatory minimum sentence of fifteen years for gang defilement, but the sentence is not capped.

61. The trial court, in its discretion, sentenced him to 30 years. While the sentence is severe, it is within the statutory framework.

62. However, the Appellant's status as a minor at the time of the offence is a significant mitigating factor.

63. *The Constitution* of Kenya, under Article 53(1)(f), provides that a child's best interests are of paramount importance in every matter concerning the child.

64. Further, Article 53(2) stipulates that a child in conflict with the law has the right to a treatment that promotes the child's sense of dignity and worth and is age-appropriate.

65. The *Children Act*, 2022, in Section 216(1), emphasizes that detention of a child should be a measure of last resort and for the shortest appropriate period.

66. The Appellant, having turned 18 after conviction, is no longer a child, but the principle of sentencing must consider his age at the time of the offence.

67. Considering the gravity of the offence and the tender age of the victim, a custodial sentence is warranted. However, considering the Appellant's age at the time of the offence and the potential for rehabilitation, the initial sentence of 30 years is manifestly excessive in the circumstances.

68. A sentence that balances the need for punishment, protection of the public, and the possibility of reform would be more appropriate.

69. The court has taken note of the Appellant's submissions regarding his status as a minor at the time of the offence and the harshness of the sentence.

70. The gravity of the offence against a five-year-old child cannot be understated, and a custodial sentence is undoubtedly warranted to reflect societal condemnation and for the protection of children.

71. However, the principle of sentencing must be individualized, especially when dealing with a child in conflict with the law.

72. The Appellant was 17 years old at the time of the offence. *The Constitution* of Kenya, 2010, and the *Children Act*, 2022, provide a robust framework for the treatment of such offenders, emphasizing rehabilitation and reintegration.

73. Article 53(1)(f) of *the Constitution* mandates that the best interests of the child shall be a paramount consideration in every matter concerning the child. Article 53(2) further stipulates that a child's detention shall be used only as a measure of last resort and for the shortest appropriate period of time.

74. Section 216(1) of the *Children Act*, 2022, reinforces this, stating that the detention of a child, whether before or during trial, shall be a measure of last resort and shall be for the shortest period of time.

75. While the Appellant is now an adult, the sentencing court was, and this appellate court is, bound to consider his status at the time the offence was committed.

76. A sentence of 30 years imprisonment for a 17-year-old, while legal, appears to not have given sufficient weight to his status as a child offender and the constitutional principles that attach to that status.

77. The objective of rehabilitation must be balanced with the demands of justice.

78. In light of the foregoing, and to ensure that the sentence imposed is not only lawful but also just and proportionate in all circumstances, this court finds it imperative to call for a Presentence Report on the Appellant.

79. Furthermore, in the interest of justice and to ensure uniformity in the treatment of co-accused who were both minors, a report is also necessary for his co-accused, JMZ, who did not appeal his committal to a borstal institution.

80. Consequently, the following orders are hereby issued:

    i. The conviction of the Appellant for the offence of Gang Defilement contrary to Section 10 of the *Sexual Offences Act* is hereby upheld.

    ii. The sentence of 30 years imprisonment imposed by the trial court is hereby set aside pending resentencing.

    iii. A Probation Officer is hereby directed to prepare and file a comprehensive Presentence Report for the Appellant, DMM.

    iv. A Probation Officer is further directed to prepare and file a Progress Report for the co-accused, JMZ, detailing his circumstances and progress at the borstal institution.

v. The mentioned reports shall be filed in this court within 21 days from the date of this order.

81. The final sentence for the Appellant will be pronounced upon receipt and consideration of the Presentence Report.

82. Orders to issue accordingly.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF OCTOBER 2025 IN OPEN COURT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

.....for the State

.....for the Appellant