



**HM v Republic (Criminal Appeal 302 of 2019)
[2025] KECA 1772 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1772 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 302 OF 2019
MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA
OCTOBER 24, 2025**

BETWEEN

HM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kisii, (Wakiaga, J.) dated 28th May 2015 in HCCRA No. 04 of 2013)

JUDGMENT

1. This appeal arises from the judgment delivered by Wakiaga, J on 28th May, 2015, in the High Court of Kenya at Kisii in Criminal Appeal No. 04 of 2013.
2. The appeal originates from the charges preferred against the appellant, HM, before the Chief Magistrate’s Court at Kisii for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*,” SOA”. The particulars of the offence were that on 20th October, 2011, in (particulars withheld) sub-location, Kisii South District, within Kisii County, the appellant intentionally and unlawfully caused his male genital organ namely, the penis to penetrate the female genital organ namely, the vagina of SMM ¹, a girl aged 12 years. The alternative charge preferred of Indecent act with SMM is irrelevant for purposes of this judgment and we shall not therefore belabor it.
3. The appellant pleaded not guilty to the charges, prompting the trial to ensue. The prosecution called a total of five witnesses to support its case. In a nutshell the prosecution case was that the appellant, who happened to be SMM’s father, had repeatedly defiled her after chasing away her mother, and despite her reporting the incidents to her mother and aunt, no action was taken until she confided into PW4, PLK, the head teacher of (particulars withheld) Primary School, where she was a pupil. She told her that the appellant had been defiling her since she was in Class II. She subsequently contacted SMM’s mother,

¹ Initials used to protect the minor’s identity



who confirmed the allegations. She then escalated the matter to the appropriate authorities by alerting PW2, JON , an area assistant chief, who advised her to take SMM for medical examination. PW3, Edmond Oyunge Ratemo, a clinical officer, examined SMM and noted a broken hymen, confirming defilement. PW5, PC Julia Lowoi, the investigating officer, facilitated the appellant's arrest following the investigations and thereafter preferred the charges.

4. At the close of the prosecution's case, the court placed the appellant on his defence. In his unsworn state of defence, the appellant denied the charges, claiming that he was framed by his wife due to personal disputes. After evaluating the evidence, the trial court found the prosecution had proved its case against the appellant beyond reasonable doubt. In the same breathe, it dismissed the appellant's defence as unconvincing and unsupported by any credible evidence. Consequently, the court convicted the appellant and sentenced him to 25 years' imprisonment.
5. The appellant, being dissatisfied with the judgment of the trial court, filed an appeal against his conviction and sentence in the High Court of Kenya at Kisii. The High Court after reviewing the evidence, came to the conclusion that the decision of the trial court could not be impugned. It accordingly dismissed the appeal in its entirety.
6. The appellant still being dissatisfied with the judgment of the High Court, has now approached this Court on a second and perhaps last appeal. In his undated memorandum of appeal, the appellant appears to challenge only the sentence and not the conviction. Indeed at the plenary hearing of the appeal, he confirmed that his appeal was all but sentence. The appellant in support thereof argues that the sentence imposed was excessive and should have been reviewed by the High Court. He states that he is from an impoverished background; his rehabilitation and reform efforts while in custody should count for something and his advancing age alongside the time already spent in incarceration should be considered. For these reasons, the appellant prays that the appeal on sentence be allowed and that the 25-years sentence be set aside, reduced, or reviewed as this Court may deem fit.
7. When the appeal was called out for hearing, the appellant appeared in person on our virtual platform, while the respondent was represented by Mr. Kimanthi, learned Prosecution counsel. Both parties agreed to rely entirely on their respective written submissions that they had filed. The appellant's submissions merely reiterated, elaborated and expounded on the above grounds and we need not therefore rehash them.
8. In response, Mr. Kimanthi submitted that the sentence imposed was well grounded in law. Counsel argued that the 25-year sentence complied with Section 8(3) of the SOA which prescribes a minimum of 20 years imprisonment for the offence. That the trial court therefore exercised its discretion appropriately in imposing the sentence based on the circumstances of the case. Further, he contended that the appellant's personal circumstances, including his background and the hardships faced by his family due to his incarceration, do not warrant interference with the sentence, emphasizing that justice for the victim must take precedence. That the appellant's rehabilitation efforts, counsel submitted while commendable, did not provide sufficient grounds to interfere with the sentence, reiterating that punishment serves both a punitive and deterrent function, and considerations of rehabilitation should be addressed through other legal avenues. Additionally, he argued that the appellant's age and the time spent in custody do not justify a reduction of the sentence, as the penalty imposed remains lawful and proportionate to the gravity of the offense.
9. In our view, this appeal should be determined solely on whether the imposition of the 25-years imprisonment accords with the provisions of Section 8(3) of the SOA.



10. We are aware that Section 8(3) of the SOA provides that:-

“any person who commits an offence of defilement with a child between the ages of twelve and fifteen years is liable upon conviction to imprisonment for a term not less than twenty years.”

11. The evidence before the trial court, including the age assessment by Dr. George Barasa and the victim’s unequivocal testimony, established that she was indeed twelve years old at the time of the commission of the offence. The appellant too confirmed this fact in his defence. Having considered the decision of this court in *Benard Kimani Gacheru v. Republic* [2002] eKLR, where it was held that sentencing is a matter within the discretion of the trial court and an appellate court will not interfere unless the sentence is manifestly excessive or based on wrong principles, we are satisfied the trial court properly exercised its discretion in imposing the sentence and therefore there is no justifiable need for our intervention.

12. In any event, the Supreme Court in the case of *Muruatetu & another v. Republic; Katiba Institute & 4 others (Amicus Curiae)* [2021] KESC 31 (KLR) has reiterated that while mitigating factors such as rehabilitation and personal circumstances may be considered, they must not compromise the statutory objective of deterrence and retribution, especially in cases involving serious offences such as defilement. Therefore, whereas the appellant’s reform efforts and good conduct in prison are commendable, they do not outweigh the gravity of the offence nor provide sufficient justification for reducing the sentence below the statutory threshold. The SOA was designed to protect minors and deter such crimes, reinforcing the mandatory minimum sentence to reflect the seriousness of the offence. The appellant’s efforts notwithstanding, do not diminish the initial culpability nor override the need for appropriate punishment under the law. Accordingly, the sentence imposed remains justified within the legal framework.

13. In light of all the foregoing, we are satisfied that the grounds advanced by the appellant do not warrant a reduction or review of the sentence imposed in view of the gravity of the offence. Accordingly, the appeal is dismissed.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF OCTOBER, 2025

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

