



**MK v Republic (Criminal Appeal E008 of 2024)
[2025] KEHC 15383 (KLR) (27 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E008 OF 2024
JN KAMAU, J
OCTOBER 27, 2025**

BETWEEN

MK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon S. K. Manyura (RM) delivered at Hamisi in the Senior Principal Magistrate's Court in Sexual Offence Case No E056 of 2022 on 14th June 2023)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. The Learned Trial Magistrate, Hon S. K. Manyura (RM) convicted him on the charge of defilement and sentenced him to thirty (30) years imprisonment.
3. Being dissatisfied with the said Judgement, on 13th February 2024, he lodged an appeal herein. His Petition of Appeal was dated 3rd January 2024. He set out four (4) grounds of appeal. On 14th March 2025, he filed Supplementary Grounds of Appeal dated 14th March 2025. He set out six (6) Supplementary Grounds of Appeal.
4. His Written Submissions were dated 14th March 2025 and filed on 21st March 2025 while those of the Respondent were dated 27th March 2025 and filed on 28th March 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal, Supplementary Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution's Case

9. Ground of Appeal No (2) and (3) of the Petition of Appeal and Supplementary Grounds of Appeal No (1), (2), (3), (4) and (6) were dealt with under this head.
10. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.
11. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga v Republic* [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

12. The Appellant placed reliance on several cases among them the case of *Kaingu Alias Kasomo v Republic*[2010]eKLR where it was held that the clinical doctor brought the age assessment but failed to explain how he assessed the complainant's age and the case of *Eliud Ouma Agwara v Republic*[2015]eKLR where it was held that sworn evidence alone or a P3 form could not suffice unless the producer of the same testified that he or she medically examined the complainant and assessed his or her age.
13. He argued that in this case, the Age Assessment Report was not produced by its maker. He contended that the Investigating Officer, No 260380 PC Chepkirui Janet (hereinafter referred to as "PW 3"), produced the same without seeking for the leave of court to produce it and it did not matter if the defence objected to its production or not as she was not the maker calling for the rejection of the evidence pursuant to Article 50 (4) of *the Constitution* of Kenya, 2010.



14. He also argued that the said PW 3 did not adduce electronic certificate under Section 65(8) and 106B (sic) allowing its production by him (sic). He added that he (sic) also did not explain how the age of the Complainant, YK (hereinafter referred to as “PW 1”) was assessed and hence, age was not proved.
15. He was emphatic that sworn evidence alone could not suffice hence the sentence meted on him was a conjecture and he ought to be acquitted for a re-trial as was held in the case of *Koome v Republic* (2005) 1 KLR 575. He further cited the case of *Francis Omurono v Uganda Criminal Appeal No 2 of 2000* where it was held that the nature of evidence presented in proof of the victim’s age should be credible and reliable.
16. On the other hand, the Respondent submitted that the Charge Sheet indicated that PW 1 was nine (9) years of age at the time of the commission of the offence. It relied on the case of *Musyoki Mwakavi v Republic*[2014]eKLR where it was held that in a charge of defilement, age of the minor could be proved by medical evidence, baptism card, school leaving certificates, by the victim’s parents and/or guardians, observation or common sense.
17. It pointed out that PW 3 testified that PW 1 was nine (9) years old and produced an Age Assessment Report dated 23rd December 2022 as an exhibit during trial.
18. This court had due regard to the case of *Kaingu Elias Kasomo v Republic Criminal Case No. 504 of 2010* (unreported) where the Court of Appeal stated that the age of a minor in a charge of defilement could be proved by medical evidence and documents such as baptism cards, school leaving certificates, observation or common sense as was held in the case of *Musyoki Mwakavi v Republic* (Supra).
19. Notably, PW 3 produced PW 1’s Age Assessment Report dated 23rd December 2022 which indicated that PW 1 was approximately nine (9) years old. The incident took place on diverse dates between 1st September 2022 to 6th October 2022. This meant that PW 1 was nine (9) years old at the material time.
20. As the Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut the said evidence by adducing evidence to the contrary, this court was satisfied that PW 1’s age was proven by medical evidence and that she was a child at all material times. His argument that the same ought to have been produced by the maker and/or PW 3 ought to have adduce electronic certificate to that effect was, therefore, rendered moot.

B. Identification

21. The Appellant submitted that the testimonies of PW 1, Lilian Halai Andega (hereinafter referred to as “PW 2”) and PW 3 were inconsistent. He questioned whether PW 2 medically examined the stain on PW 1’s uniform to conclude that it was as a result of sexual intercourse, why PW 2 insisted that PW 1 should tell her the truth and proceeded to beat her, whether a statement obtained out of torture was admissible in court pursuant to Article 25 of *the Constitution* of Kenya, 2010 and why PW 2 and PW 3 refused to accept PW 1’s evidence that she had been defiled by other people namely Jackson and Joseph.
22. He asserted that PW 2 had a target of implicating him in this crime. He denied being PW 1’s defiler and put blame on the mentioned Jackson and Joseph. He invoked Section 33(a)(i) of the *Sexual Offences Act* 2006 and placed reliance on the case of *Terekali & Another v Rex*(1952) EACA on the evidence of first report and later embellishments under Section 124 of the *Evidence Act*. He was emphatic that PW 1 was not a reliable witness.
23. On its part, the Respondent submitted that PW 1 testified that it was the Appellant who defiled her and that she stayed with him at her grandmother’s house. It was emphatic that there was proper identification as PW 1 had prior knowledge of the Appellant. It contended that as the Appellant was



- someone PW 1 knew well, she could not have been mistaken as to his identity. It pointed out that that was evidence of recognition which was held by courts to be more reliable and weightier than that of identification of a stranger as was held in the case of *Anjononi & Others v Republic* (1976-80) 1 KLR 1566, 1568.
24. It asserted that the inconsistencies and contradictions did not go into the core of the case and that the variance in itself did not in any manner distort or dislodge the commission of the offense as was held in the case of *S.O.O v Republic*[2018]eKLR which cited the Tanzanian case of *Dickson Elia Nsamba Shapwata & Another v The Republic Criminal App No 92 of 2007*.
 25. It also cited the case of *MTG v Republic* (eKLR citation not given) where it was held that contradictions in evidence of a witness that would be fatal had to relate to material facts and be substantial.
 26. A perusal of the proceedings showed that PW 1 testified that on 6th October 2022, uncle (the Appellant) opened the gate where he lived, laid her on the grass outside the gate, removed her pant, put his thing on hers, (the thing she uses to pee and the thing he uses to pee). She further said that when she went to school, the teachers looked at her whereupon PW 2 called her during break time and asked her what was wrong. When she was unable to say, PW 2 beat her until she said that it was the Appellant who had defiled her.
 27. PW 2's evidence corroborated that of PW 1. She confirmed that although PW 1 at first had said that it was a neighbour who had defiled her, she later confirmed that it was not a neighbour but rather, it was her uncle, the Appellant herein who defiled her.
 28. This court noted that PW 1 was the only identifying witness as was submitted by the Appellant. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.
 29. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis).”
 30. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence such as proof of penetration could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful.
 31. PW 1 positively identified the Appellant who was her uncle as the perpetrator of the offence. PW 2 was emphatic that PW 1 informed her that it was the Appellant who defiled her and not a neighbour. In his defence, he had referred to PW 1's grandmother as his mother. As the Appellant and PW 1 stayed in the same home and were related, there could not, therefore, have been any possibility of a mistaken



identity. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition

C. Penetration

32. The Appellant submitted that PW 1 indicated that he put his thing on her where she uses to pee and argued that the word “pee” was not understood whether it was urinating or removing faeces. He questioned whether PW 1 meant she was defiled on the anus. He contended that although the use of euphemism was admitted in sexual offences such abstract euphemism could not prove the case beyond reasonable doubt. He added that her statement that “she put on me and not in me” was contrary to Section 2 of the *Sexual Offences Act* Cap 63A (Laws of Kenya). He faulted the Trial Court for not appreciating his defence that overwhelmed the Prosecution’s case.
33. The Respondent also referred to Section 2 of the *Sexual Offences Act* and placed reliance on the case of Mohammed Omar Mohammed v Republic[2020]eKLR where it was held that the key evidence relied upon by the courts in rape and defilement cases in order to prove penetration was the complainant own testimony which was usually corroborated by the medical report presented by the medical officer. It submitted that the evidence of the Clinical Officer, Ibrahim Vonyoli Kegoye (hereinafter referred to as “PW 4”) corroborated that of PW 1 and that penetration was, therefore, proved.
34. It argued that the Appellant did not rebut the Prosecution evidence and thus, his assertion that the Trial Court did not consider his defence was not merited.
35. It placed reliance on the case of Charles Wamukoya Karani v Republic Criminal Appeal No 72 of 2013 (eKLR citation was not given) where it was held that the critical ingredients forming the offence of defilement were age of the complainant, proof of penetration and positive identification of the assailant. It was emphatic that all the ingredients of the charge of defilement were proved beyond reasonable doubt.
36. Notably, PW 4 confirmed that there were lacerations on PW 1’s vagina and concluded that she was defiled. He produced the P3 Form, Post Rape Care (PRC) Form and treatment notes as exhibits during trial.
37. In his defence, the Appellant denied defiling PW 1. In his evidence that was given under oath, he stated that he asked his mother about PW 1 as she could not be seen at home. He explained that later, she came with her teachers and Police Officers and they were told that she had been defiled and that her clothes had yellow marks. He denied having committed the act and asserted that her teacher confused her by asking her five (5) times who had defiled her.
38. Notably, PW 1’s evidence was corroborated by the scientific evidence of PW 4. The Appellant’s defence was simply a denial. His evidence was not watertight enough to have displaced the Prosecution’s inference of guilt on his part. His argument that the case was full of contradictions or that he was framed thus fell by the wayside. As had been stated hereinabove, any contradictions or inconsistencies were insignificant and did not affect the inference of guilt on his part. The witnesses that were called by Prosecution adduced sufficient evidence to establish the charge.
39. In the premises foregoing, this court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 on the material diverse dates as there was proof of defilement as PW 4 testified.
40. In the premises foregoing, Ground of Appeal No (2) and (3) of the Petition of Appeal and Supplementary Grounds of Appeal No (1), (2), (3), (4) and (6) were therefore not merited and the same be and are hereby dismissed.



II. Sentence

41. Ground of Appeal No (1) and (4) of the Petition of Appeal and Supplementary Ground of Appeal No (5) was dealt with under this head.
42. The Appellant submitted that he was entitled to a least prescribed sentence pursuant to Article 25(c) and 50(2)(p) of *the Constitution* of Kenya. He pointed out that he was arrested on 18th October 2022 and sentenced on 14th June 2023. He, therefore, urged the court to consider the time that he spent in remand during trial pursuant to Section 333(2) of the Criminal Procedure Code.
43. The Respondent cited Section 8(2) of the *Sexual Offences Act* and Section 329 of the Criminal Procedure Code and pointed out that the Trial Court took into account the evidence, the nature of the offence and the circumstances of the case in arriving at the appropriate sentence.
44. It placed reliance on the cases of Benard Kimani Gacheru v Republic [2002] eKLR where it was held that sentencing was essentially an exercise of the trial court and that for a court to interfere, it had to be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied and the case of Republic v Jagani & Another (2001) KLR 590 where it was held that the purpose of a sentence was usually to disapprove unlawful conduct and assist in rehabilitation.
45. It further cited the case of Supreme Court Petition No E018 of 2023 Republic v Joshua Gichuki Mwangi (eKLR citation not given) where it was held that although sentencing was an exercise of judicial discretion, it was Parliament and not judiciary that set the parameters of sentencing for each crime. It added that the Supreme Court also differentiated between mandatory sentences and minimum sentences and stated that mandatory sentences left no discretion to the judicial officer whereas minimum sentences set the floor rather than the ceiling of such sentences. It contended that the sentence that was meted out against the Appellant was lawful. It added that he had not demonstrated the reasons for interfering with the same.
46. Notably, the Appellant was convicted and sentenced under Section 8(2) of the *Sexual Offences Act* Cap 63 A (Laws of Kenya). The said Section 8(2) of the *Sexual Offences Act* provides that:-

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
47. This court noted that Trial Court sentenced the Applicant to thirty (30) years imprisonment instead of the life imprisonment mandatory minimum sentence. This court could not fault the Trial Court for having sentenced him to a lesser sentence than was prescribed in the *Sexual Offences Act* as the jurisprudence at the time he was sentenced allowed courts to exercise discretion during sentencing.
48. Notably, on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi v Republic [2022] eKLR which had reiterated the reasoning in the case of Dismas Wafula Kilwake v Republic [2018] eKLR to the effect that Section 8 of the *Sexual Offences Act* had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence. In its said decision, the Supreme Court held that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.
49. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce the Appellant’s sentence. It had no option but to leave the sentence of thirty (30) years that was meted against the Appellant herein undisturbed.



50. This court was not persuaded to enhance the sentence to life imprisonment, as the Respondent did not put the Appellant on notice that it would be seeking an enhancement of the sentence which would have allowed him to make an informed decision as to whether he would have wished to proceed with his appeal or if he would have wished to abandon the same. Enhancing his sentence without giving him an opportunity to respond would be contrary to the principles of fair trial provided in Article 50 of *the Constitution* of Kenya. All the same, the Respondent did not seek an enhancement of the sentence of thirty (30) years but merely proposed that the same be upheld.
51. Going further, this court was mandated to consider the period that he spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
52. The said Section 333(2) of the Criminal Procedure Code provides that:-
- “Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code
- Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).
53. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:-
- “The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:...
- (ix) Time already spent in prison by the convict...”
54. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR.
55. A perusal of the Charge Sheet indicated that the Appellant was arrested on 18th October 2022. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 14th June 2023. This was a period that ought to be taken into account while computing his sentence. A perusal of the court proceedings indicated that the Trial Court did not take this period into account which was erroneous.
56. In the premises, Ground of Appeal No (1) and (4) of the Petition of Appeal and Supplementary Ground of Appeal No (5) were not merited and the same be and are hereby dismissed. However, the Appellant’s prayer under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) was merited and the same be and is hereby allowed.

Disposition

57. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal dated 3rd January 2024 and lodged on 13th February 2024 and Supplementary Grounds of Appeal dated 14th March 2025 and filed on 21st March 2025 were not merited. In this regard, his conviction and sentence be and are hereby upheld as they were both safe.
58. However, for the avoidance of doubt, his prayer under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) was merited and the same be and is hereby allowed. The effect of this is that



the period between 18th October 2022 and 13th June 2023 be and is hereby taken into account while computing his sentence pursuant to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya)

59. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF OCTOBER 2025.

J. KAMAU

JUDGE

