



**SMW v Republic (Criminal Appeal E019 of 2024)  
[2025] KEHC 15146 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15146 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL E019 OF 2024  
AK NDUNG’U, J  
OCTOBER 24, 2025**

**BETWEEN**

**SMW ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original Conviction and Sentence in Nanyuki CM  
Sexual Offences Case No E044 of 2023 – B. Mararo SPM)*

**JUDGMENT**

1. The Appellant, SMW, was convicted after trial of defilement contrary to Section 8 (1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on diverse months of June 2023 and September 2023 at Laikipia East Sub-county in Laikipia County intentionally and unlawfully caused his penis to penetrate the vagina of AN a girl aged 13 years old. On 25/03/2024, he was sentenced to fifteen (15) years imprisonment.
2. Being aggrieved by the conviction and the sentence, he lodged this appeal vide a petition of appeal filed on 12/04/2024. The conviction and sentence have been challenged upon the following grounds –
  - i. The learned magistrate erred by not finding that the medical evidence that was produced did not conclusively prove that there was penile penetration.
  - ii. The learned magistrate erred by failing to observe that the evidence of prosecution witnesses was contradictory and inconsistent and it was dangerous to have relied on that evidence to convict him.
  - iii. That the prosecution did not prove beyond reasonable doubt that he committed the offence.



3. The appeal was canvassed by way of written submissions. In his submissions, the Appellant argued that the trial court placed reliance on the medical evidence of an old broken hymen which was misplaced and not conclusive proof of penetration. That PW1 failed to lay foundation of his competence to produce the P3 and PRC form since he failed to inform the court whether he was conversant with the handwriting and signature of the maker of the said documents. Therefore, Section 77 of the Evidence Act was violated and since PW1 was not conversant with the handwriting and signature of the maker, his evidence was thus inadmissible. Further, the information adduced did not inform the court whether penetration had occurred or not since the information he conveyed failed to show the prognosis or opinion of penetration. The medical officer's opinion was absent hence medical evidence was not conclusive. Further, PW1 testified that complainant's mother noted whitish discharge that resembled spermatozoa thus introducing new matter that was not observed by the examining clinical officer or ever mentioned by PW2's mother in her evidence.
4. He submitted that the evidence of a minor must be put through a thorough credibility test including consideration of the circumstances surrounding the entire case and that is why Section 33 of the Sexual Offences Act provides for consideration of circumstantial evidence because a minor may be susceptible to third party influence as was held in Jamaica Supreme Court Criminal Appeal No. 53 of 2009 (2014) JMCA. The trial court failed to record PW2's manner and demeanour. No record on whether she was truthful or firm on cross examination in line with Section 124 of the Evidence Act and there was no mention of Section 124 in the trial court judgment. That in the backdrop of the disjointed, inconsistent evidence of PW2, PW4 and PW5, how could it be said that the case was proved? The trial court failed to assess the demeanour of the prosecution's witnesses in line with Section 199 of the Criminal Procedure Code.
5. He argued that the vocabulary that PW2 used to described the sexual attack sounded coached and exaggerated and rehearsed. That the matter would have sounded genuine if she should have used term as tabia mbaya. That her evidence when compared with medical evidence which revealed no injuries made her evidence to be far-fetched. The fact that she was stupefied with unknown drug also was far-fetched as medical evidence did not reveal any sign of being drugged. He submitted that there was a discrepancy on the date of the alleged offence since PW4 testified that she reported the matter on a Tuesday whereas PW3 had earlier testified that the matter was reported on a Sunday and PW2 testified that they reported on Tuesday when she was going for eye clinic. That PW5 testified that epithelial cells were observed upon examination of PW2 whereas PW1, the medical officer did not mention epithelial cells. Further, the PRC form was irregularly produced by PW5, the investigating officer on behalf of the maker which rendered the entire trial unfair and prejudicial to him. That only a medical officer can produce a medical document on behalf of a colleague and a police officer is not an expert witness.
6. That there were myriad of irregularities throughout the trial that violated his rights under Article 50 and Article 27 of the Constitution was violated as he was not accorded equal protection of the law. On the sentence, he urged the court to consider the time he spent in remand during trial.
7. The Respondent's counsel filed written submissions opposing the appeal. He stated that the Appellant purportedly introduced new grounds of appeal through his submissions without leave of the court. He urged the court to disregard any ground introduced through the submissions. He submitted that age of the victim was sufficiently proved through her birth certificate, Pexhibit 2. As to penetration, he submitted that the Se was sufficiently proved based on the testimony of the victim coupled with the medical evidence. As to identification, he submitted that the Appellant was PW2's stepfather and they lived in the Se house. As to whether he defiled the complainant, it was submitted that this was clearly narrated by PW2 whose testimony was clear and cogent that he performed the act of penetration in the month of June, July and August 2023. That PW3 testified that he found PW2 sleeping with her



legs spread and PW4 stated that in the month of July 2023 while doing laundry, she noticed sperms in PW2's black tight and she called the Appellant who confirmed the Se.

8. Regarding sentence, counsel submitted that it was upon the Appellant to demonstrate that the sentence was manifestly excessive, or that the trial court overlooked some material factor, or took into account some wrong material or acted on a wrong principle as was held in Shadrack Kipkoech Kogo vs R Eldoret Criminal Appeal No.253 of 2003. He failed so to do. It is submitted that the court considered the Appellant's mitigation and the period spent in custody hence the sentence was not only lawful but lenient in the circumstances.
9. This court is sitting as the first Appellate court in the matter. Its duty is well set out in law. The court must re-evaluate the evidence afresh and reach its independent conclusion(s) or findings.
10. This legal principle is etched in our jurisprudence with particular clarity in legal precedent. In Okeno vs. Republic [1972] EA, the Court of Appeal stated as follows

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

11. Similarly, in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses”.

12. In essence therefore, this court is engaged in “a re-hearing “ of the matter with the exception that it does not, like the trial court, have the advantage of seeing and hearing the witnesses testify. A look at the evidence on record becomes pivotal.
13. That evidence was as follows. PW1, the clinical officer, produced the P3 form filled by his colleague Fidelis Mbugua who was on leave. He testified that he had worked with her for 5 years. He testified that on examination, the complainant's hymen was old broken, no bruises on genitalia, there was whitish discharge, HIV was negative, urinalysis positive, pus cells were noted on high vaginal swab, redioleses-3+. He produced the P3 form as Pexhibit1A. He testified that the mother noted whitish substance resembling spermatozoa.



14. PW2, the complainant testified that in June 2023, she went looking for her brother's trouser and the Appellant asked her where she was. He stepped into the bedroom and removed white handkerchief and a bottle and placed it on her nose and she lost consciousness. The next morning, she had no tights and she was feeling pain on the lower part of the body especially where she passes urine. She saw something like 'makamasi'. In July, he went with a motorcycle outside the gate and sent her to the house. He entered and asked for tea but she told him that there was no tea. He closed the door and asked her that they have sex but she refused. He held her by force and he raped her. She testified that he tied her hands with a lesso, removed her clothes(shorts) and made her lie on the seat and he removed his clothes. He lay on her and had sex. That he penetrated her vagina with his penis. He put on his clothes and told her not to tell anyone. She testified that he used to falsely accuse her on daily basis.
15. She testified that in August, 2023, her mom left at 8:00p.m and returned home at 10:00pm. That the Appellant went home at 9:00pm and he told the children to sit aside and told the brother to sleep. He sat next to her and she did not know what happened. That she saw a white cloth in front of her face and she lost consciousness. That she did not know when the uncle arrived. That while going to church on a Sunday, the uncle told her mom how he opened the gate and found her on the seat with her legs spread unconscious. He got annoyed, slapped her and told her to go to sleep. That the Appellant asked him why he hit her yet she was sleeping but he told him that she was not sleeping properly. She testified that in June 2023, she had told her mom that there was makamasi in her vagina and she told her to tell the Appellant to stop touching her breasts and stomach. That she was going for eye clinic and her mom said they report and she was referred to hospital where it was found that she had been defiled.
16. On cross examination, she testified that it was on a Thursday night when her uncle found her sleeping naked. That she went to hospital on Tuesday. He came on Saturday and they recorded statement on Tuesday.
17. PW3 CR testified that on 16/09/2023, he had come from work at around 9:30pm. He opened the gate, knocked and the Appellant opened. He saw the complainant sleeping badly and he slapped her. Her legs were spread. She had uniform, she got scared and she was not herself for 5 seconds. The mother came and he told her to tell the complainant to sleep well. On the next day, he heard the mother saying that the child was feeling pain in her private parts. They went to report and he went to work.
18. On cross examination, he testified that he told the complainant to cover herself. That the mother checked the child on 17<sup>th</sup> and reported on that day. That 17<sup>th</sup> was a Sunday.
19. PW4, the complainant's mother testified that in July, she was washing clothes and noticed that complainant's black tight had sperms and he called the Appellant who confirmed and they agreed to talk to her. She did not talk to her. In August, the complainant told her to warn S and she said that he presses her stomach and touches her breast. She did not tell him but she went and told a colleague and she was told to talk to her but she did not. On 16/09/2023, she returned at 10:00pm and she found her brother and she asked for the complainant but she was informed that she had slept. On Monday 18<sup>th</sup>, the brother told her to caution complainant as he found her sleeping inappropriately and slapped her. On Tuesday, the complainant said she was not going to school as she was in pain and had makamasi. She told her to remove her pants and lie on her back and she checked her and noticed that her hymen was broken. She reported at hospital and police interrogated her and she said it was the father who was responsible. That he occasionally used a white cloth and she was examined and found to have been defiled.



20. On cross examination, she testified that PW3 went home on Saturday and he informed her on Monday but she did not take action as she was going to work. That PW3 informed her on Sunday or Saturday. That they went to the station/hospital on Tuesday and that 16<sup>th</sup> was on a Saturday.
21. PW5, the investigating officer testified that on 21/09/2023, PW4 reported a case of defilement of her daughter. They went to Nanyuki teaching and Referral Hospital where the P3 and PRC forms were filled. That the Appellant defiled the child in June, July and August.
22. On cross examination, she testified that the matter was reported on 21/08/2023 on a Thursday and not on a Tuesday. That the report was made in September and that he had threatened to kill her.
23. In his sworn testimony, the Appellant testified that he left for work on 21/08/2023 and he found gate locked and the wife and children were missing. They got home at 10:00pm and said that they had gone to see a pastor. On 10/09/2023, he left for work and at 11:00pm, he saw his wife and others and she said ni huyo. They said they were police and requested that he go to police station and he was informed that he was being charged with defilement. The rest of his defence was submissions against the prosecution's case.
24. On cross examination, he testified that the complainant was his stepdaughter and he did not have a grudge with her. That in September, he was in the house and the complainant lived there. There was no other person in the house and the complainant's uncle found him with her.
25. That was the totality of evidence before the trial court. I have had occasion to consider the evidence as recorded at trial. In doing so, I have taken cognizance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have taken into account the submissions made for and against this appeal. I have had due regard to the case law cited and the applicable statutory provisions. Of determination is whether the prosecution proved its case against the Appellant to the required legal threshold; beyond reasonable doubt.
26. The Appellant was charged with the offence of defilement. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the [Sexual Offences Act](#) No. 3 2006.
27. The prosecution was duty bound to prove each of the ingredients herein for a conviction to lie.
28. Proof of age is important in a sexual offence. In *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:
 

“Age of the victim of sexual assault under the [Sexual Offences Act](#) is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”
29. In the present appeal, the Appellant did not dispute the age of the complainant. Age was proved through her birth certificate Pexhibit2 which indicated that she was born on 12/01/2010 hence she was 13 years old at the time the alleged offence was committed and therefore a minor.
30. As to whether penetration was proved, the Appellant attacked the evidence by PW1, the clinical officer who produced the P3 form on behalf of one Fidelis Mbugua, the clinical officer who examined the complainant. The Appellant testified that PW1 failed to attest whether he was aware of Fidelis Mbugua handwriting and signature hence section 77 of the [Evidence Act](#) was not complied with.



31. The record shows that one Salat Guyo testified on behalf of one Fidelis Mbugua who filled the P3 form. He testified that the said clinician was on leave and he had worked with her for five years. It was thereafter recorded as follows;

“I pray to be declared competent.

Accused-no objection.

Court-Witness declared competent...”

32. PW1 continued with his testimony and produced the P3 form as Pexhibit 1A.

33. It is the Appellant’s submission that PW1 failed to testify whether he was conversant with Fidelis Mbugua handwriting or signature despite working with her for five years. It is trite law that evidence touching on expert opinion should be tendered by experts as provided under Section 48 of the Evidence Act and in situations where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar field of expertise and who are familiar with handwritings of the unavailable experts can be called upon to tender such evidence as provided under Section 33 of the Evidence Act which states that;

“Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases–“ ...

34. Such evidence is admissible and by dint of Section 77 (1) of the Evidence Act, the evidence is presumed genuine and authentic. The provisions of Section 77 of the Act on its own allows a person other than one who prepared a report to produce it provided that the presumption of authenticity is met and if the document is signed by the person who held the office and qualifications which he professed to hold at the time when he signed it (Section 77(2) of the Act. Section 77 provides as follows:-

“77 (1) In criminal proceedings any document purporting to be a report under the handwriting of a Government Analyst, Medical Practitioner or of any Ballistics expert, Document Examiner or Geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume the signature of any such document is genuine and that the person signing it or the office and qualifications which he processed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, Ballistics expert, Document Examiner, Medical Practitioner, or Geologist, as the case maybe, and examine him as to the subject matter there of”.

35. Courts however have a discretion, if called upon, not to call makers of such documents if the interest of justice so demands. The condition precedent to the operation of Section 77 is provided under Section 33 which requires that a basis has to be laid before a witness other than the maker of a document can competently tender the evidence.



36. In the instant case, PW1 did not attest to the handwriting or the signature of the maker. The PRC was also irregularly produced by PW5, the investigating officer. It therefore follows that the medical evidence was inadmissible.
37. It is however trite law that defilement can be proved by the evidence of the victim alone and circumstantial evidence as it has been held in a myriad of cases.
38. In *Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)* thus;
- “the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”
39. In *Bassita v Uganda S.C. Criminal Appeal No. 35 of 1995* which was quoted with approval in *Smy Charo Kirao v Republic [2020] KLR* where the court stated;
- “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”
40. Section 124 of the *Evidence Act* which 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.”
41. I have perused the judgment of the learned magistrate and note that he based the conviction on the witnesses’ evidence. He stated that from the analysis of the evidence, there was ample evidence to prove that penetration did occur. He further held that he carefully considered the testimonies of PW2 and PW4 and found that they were truthful and that they had no grudge against the Appellant. The trial magistrate was categorical that in the court’s finding, the witnesses were truthful and the failure to mention S124 of the *evidence Act* cannot be in the circumstances a ground upon which to fault the court’s conclusion. This is well illustrated in the decision in *Robert Wekesa Simiyu v Republic [2019] eKLR* where the court held that;
- “There are no strait-jacketed reasons that must be recorded. What matters most is the impression made on the trial magistrate by the overall evidence of the witness. Those are the reasons he must record.”
42. I have re-evaluated the evidence as required of this court by law. The complainant testified how in June, 2023 the Appellant found her in the bedroom and he removed a white handkerchief and a bottle and



placed it on her nose and she lost consciousness to wake up without tights and in pain on the part she passes urine and saw something like ‘makamasi’. In July 2023, she testified how the Appellant asked her that they have sex and when she refused, he tied her with a lessa, removed her clothes, made her lie on the seat and he removed his clothes. He lay on her and penetrated her vagina with his penis. And in August, he ordered the children to sleep and she saw a white cloth in front of her face and she lost consciousness. She did not know when her uncle entered the house. She stated that in June, she informed her mother that there was ‘makamasi’ from her vagina and she told her to tell the Appellant to stop touching her breasts/stomach.

43. There exists no iota of evidence that the complainant had any grudge or other known reason why she would frame the Appellant with the offence herein. Her evidence is corroborated by the evidence of PW3 and PW4. Am satisfied penetration was proved.
44. The Appellant attacked the prosecution’s case based on the fact that there were discrepancies on the date of the commission of the offence and the date when the matter was reported as the witnesses gave conflicting days as to when the alleged offence was committed.
45. When it comes to contradictions, it is trite law as set out in numerous authorities that the court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they affect the main substance of the prosecution’s case as was held in *Erick Onyango Ondeng’ v Republic* [2014] eKLR. Further, it is well settled that where there are contradictions and inconsistencies in the evidence of witnesses, it is the duty of the court to weight the contradictions and consider whether they have any effect on the overall evidence in the case. The court in *Njuki & Other Vs Republic* (2002) 1 KLR 771 held that:

“Where such allegations are raised, the obligation of the court is to determine as to whether the said discrepancies, contradictions and indiscrepancies are of such a nature as would create doubt as to the guilt of the accused. Where they do not they are curable under section 382 of the Criminal Procedure Code”.

46. The Court of Appeal in the case of *Richard Munene –v- R Cr. Appeal No. 74/2016* (2018) eKLR the court stated:-

“It is a settled principle of law however that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessary creates doubts in the mind of the trial court that an accused person will be entitled to benefit from it.”

47. It therefore follows that the contradictions and inconsistencies must be so grave as to lead to a conclusion that the witness was not truthful and create doubt as to the guilt of the Appellant. This is informed by the obvious human fallibility and it is expected that different persons may not recollect events in exactly the same way and memory strengths will differ from person to person. The contradictions noted by the Appellant are minor and did not affect the substance of the charge and do not go into the substance of the case. No miscarriage of justice has been occasioned as a result of the difference in dates. Further, it does not lessen the fact that an offence was committed.
48. The Appellant was sentenced to fifteen (15) years imprisonment. While sentencing him, the trial court considered his mitigation and the fact that he was a first time offender. The court also considered the period he was in custody.



49. The offence under Section 8(3) provides for a sentence of not less than 20 years but he was sentenced to 15 years. It is trite law that sentencing is at the discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (*Ogolla S/o Owuor v R* {1954} EACA 270). The Appellant did not demonstrate any of the above factors.
50. The sentence of 15 years was below the mandatory sentence of 20 years prescribed by law. This court would be inclined to enhance the sentence in line with the Supreme Court’s decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) where the court stated;

“We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law....

Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate 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 that sentence”.

51. I note however that the State did not issue a notice of enhancement of sentence and neither did this court warn the Appellant at the start that, based on the outcome of the Appeal, the sentence could be enhanced. It follows then that the Appellant has not had the opportunity to consider that eventuality or to address the Se during the hearing of the Appeal. He would be heavily unfairly prejudiced if the sentence was enhanced. I am inclined to let the matter lie.
52. With the result that for reasons aforesaid, the appeal lacks merit and is dismissed in its entirety.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF OCTOBER, 2025.**

**A.K. NDUNG’U**

**JUDGE**

