



REPUBLIC OF KENYA



KENYA LAW
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**GMO v Republic (Criminal Appeal 157 of 2020)
[2026] KECA 170 (KLR) (30 January 2026) (Judgment)**

Neutral citation: [2026] KECA 170 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 157 OF 2020
P NYAMWEYA, LA ACHODE & JM MATIVO, JJA
JANUARY 30, 2026**

BETWEEN

GMO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Kisii
(Ougo J.) delivered on 25th March 2019 in HCCRA No. 52 of 2018)*

JUDGMENT

1. GMO (the appellant), was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* (the Act) at the Principal Magistrate’s Court at Ogembo in Criminal Case No. 1895 of 2018. It was alleged that on 21st September 2015 in Gucha District, within Kisii County, he intentionally and unlawfully caused his penis to penetrate the vagina of LK, a child aged 9 years. He faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Act. The indictment was that on the above date and place, he touched the vagina of LK with his penis.
2. A summary of the evidence tendered before the trial court is useful so as to put into perspective the arguments urged for and against this appeal. Briefly, PW3, (The complainant) testified that on 21st September, 2015, while alone at their home, the appellant, who is her uncle came and sought to know her father’s whereabouts. She told him he had taken the cows for grazing. The appellant followed her to the toilet, he lifted her dress, he held her neck, covered her mouth, told her not to scream, then he defiled her. After he was done, he left. The next day, she reported the ordeal to her mother.
3. Her mother (PW1) said that on 21st September 2015 she travelled to Tabaka to attend a funeral. She returned the next day at around 11am and found the complainant crying complaining of stomach pain. Together with her brother-in-law, they checked her private part and noted that she was bleeding.



- They took her to Otyachi Hospital and explained to the Doctor her condition. The Doctor asked them to step out so that he could speak to PW1. PW5's evidence was substantially similar to that of PW2; therefore, it will add no value to rehash it here.
4. The clinical officer, (PW2) testified that the complainant had a history of vaginal bleeding, her vagina had a laceration and a tear which were consistent with defilement. Urinalysis showed puss and red blood cells. It was also his evidence that the appellant was also examined at the same hospital and his penis head had bruises. He produced the P3 form and the PRC form. Upon cross examination, he confirmed that the complainant was admitted at the hospital so that she could be stabilized. It was his evidence that the complainant was 9 years old.
 5. PW4, a village elder, together with the area assistant chief arrested the appellant and handed him over to the police. The investigating officer (PW6) produced the complainant's birth certificate which shows that the complainant was born on 8th July 2007. He also produced her blood- stained pant and confirmed seeing blood stains at the toilet in which PW1 was defiled.
 6. In his unsworn defence, the complainant admitted going to the complainant's home. He stated that he used to drink but he had since stopped drinking, and that "it is drinking that brought this upon him."
 7. In a judgment dated 2nd March 2017, the learned Magistrate was satisfied that the prosecution had proved its case against the appellant and convicted him for the offence of defilement. There was no finding on the alternative count. In his mitigation, the appellant stated that he had small children who depended on him, that the charge was false. He asked for forgiveness. After considering the mitigation, the learned magistrate sentenced him to life imprisonment.
 8. His appeal to the High Court at Kisii being HCCR Appeal No. 52 of 2017 against conviction and sentence was dismissed by Ougo J. on 28th March 2019 for being devoid of merit. The appellant seeks to reverse the said decision in this appeal citing 3 grounds in his memorandum of appeal dated 22nd August 2025. These are: (a) the first appellate court erred in upholding an unfair trial process; (b) the case was not proved beyond reasonable doubt; and, (c) the sentence is disproportionate, excessive, harsh and inhumane.
 9. During the virtual hearing of this appeal on 4th September 2025, the appellant appeared in person while learned prosecution counsel Mr. Njeru appeared for the respondent. Both parties relied on their respective written submissions.
 10. In support of the appeal, the appellant questioned why the investigating officer did not record statements from the persons the appellant said he found at the complainant's home and why the prosecution failed to avail some witnesses to testify, which, according to him, occasioned an unfair trial. He also argued that the ingredients of the offence were not proved to the required standard, namely, the complainant's age, penetration and whether he was properly identified as the offender. Lastly, he maintained that the sentence of life imprisonment is harsh, excessive and unjustifiable.
 11. The respondent's counsel Mr. Njeru opposed the appeal. Regarding the alleged failure to call some witnesses, counsel cited section 124 of the *Evidence Act* and the High Court decision in Mohamed vs Republic [2009] KLR and maintained that a conviction can be based only on the evidence of a victim of a sexual offence, provided that the court is satisfied that the victim is telling the truth. Counsel also relied on section 143 of the *Evidence Act* which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. He also argued that it is not clear what value the evidence of the alleged uncalled witnesses would have added to PW3's evidence and the medical evidence which the court found to be trustworthy. He recalled that



- the complainant testified that at the time of the offence she was alone in the house and as such, the said witnesses would not have added any value on what happened at the time the offence was committed.
12. Regarding the victim's age, Mr. Njeru argued that the complainant stated that she was 9 years old at the time of the offence. In addition, the P3 form clearly indicated that she was 9 years old. Further, her birth certificate produced as PEX 5 showed that she was born on 8th of July 2007, which means she was 8 years and 2 months at the time of the offence which placed her within the bracket of section 8 (2) of the Act, therefore, her age was proved to the required degree.
 13. As to whether the appellant was positively identified as the offender, Mr. Njeru cited *R vs Turnbull & Others*, [1976] 3 ALL ER 549 which laid down the principles to guide courts in identification cases and argued that the appellant was the complainant's uncle, he lived barely 300 meters from the complainant's home, and he was well known to her. Further, on the material day, the complainant had not covered his face and he even had a conversation with her before defiling her, therefore, the identification was free from the possibility of error.
 14. Addressing the ingredient of penetration, Mr. Njeru submitted that PW3 testified that the appellant "put his private parts into her private parts." Further, the clinical officer testified that upon examining the complainant, he noted that she had vaginal bleeding, had lacerations and a tear in her vagina which was evidence of penetration. Further corroboration was provided by PW1 who testified that he examined the complainant and noted that she was bleeding from her vagina. PW6, the investigating officer produced the complainant's blood stained under pant.
 15. Regarding sentence, Mr. Njeru submitted that the prosecution having proved that the complainant was aged 9 years at the time of the offence, the sentence provided for under the Act is life imprisonment. In support of the foregoing statement, he cited this Court's decision in *Mwalango chichoro Mwanjembe v Republic* [2016] KECA 183 (KLR). Counsel maintained that the appellant was sentenced in accordance with the law and relied on the Supreme Court decisions in *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E 018 of 2023, [2024] KESC 34 (KSL) (12th July 2024) (Judgment) Neutral citation: [2024] KESC 34 KLR and *Republic vs Ayako* [2025] KESC 20 (KLR) which affirmed the legality of mandatory/minimum sentences.
 16. This Court's jurisdiction in a second appeal is governed by section 361 of the Criminal Procedure Code which allows appeals from a High Court's decision in its appellate capacity, but only on matters of law. (See the Supreme Court decision in *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [Supra] and this Court's decision in *Hamisi Mbela Davis & another vs Republic* [2012] KECA 147 (KLR)). Section 361(1) explicitly states that the Court of Appeal will not hear appeals on matters of fact, such as the severity of a sentence, unless that sentence was enhanced by the High Court or the subordinate court had no power to pass the original sentence. The rationale for this provision is to streamline the appellate process by preventing the Court of Appeal from re-examining factual findings, focusing instead on substantial legal errors made by the High Court in its appellate jurisdiction to ensure legal accuracy in the final decision.
 17. We have reviewed the record as well as the parties' rival submissions. We find that the following issues fall for determination, namely:
 - (a) whether the prosecution failed to avail key witnesses,
 - (b) whether the ingredients of the offence were proved beyond reasonable doubt,
 - (c) whether there is basis for this Court to interfere with the sentence.



18. The appellant is inviting this Court to find that the prosecution failed to avail some witnesses to testify, which, according to him, occasioned an unfair trial. We have carefully read the appellant's grounds of appeal before the first appellate court. We note that this ground was not among the grounds the appellant urged before the High Court. As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. This restriction ensures that issues are fully canvassed at the first appellate stage, preventing parties from bringing entirely new arguments to the second appellate court. However, exceptions exist, such as when the first appellate court failed in its duty to re-evaluate evidence or if a new point of law was raised for the first time by the first appellate court itself. There is nothing to show that this case falls within these permissible exceptions.
19. We will first address our minds to the gravamen of this appeal, which is whether the offence of defilement was proved to the required standard. Section 8(1) of Act states that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. A reading of the said section shows that to secure a conviction for the offence of defilement, the prosecution is obligated to prove the following ingredients:
- (a) that the victim is a child, within the meaning assigned thereto in the [Children Act](#) which defines a child as a person below the age of 18 years.
 - (b) the prosecution must prove an act causing penetration which is defined under the Act to mean partial or complete insertion of the genital organs of a person into the genital organs of another person, and,
 - (c) the assailant must be identified as the offender. These three ingredients must be proved by way of evidence beyond reasonable doubt.
20. Was penetration proved to the required standard? The Act defines penetration as the partial or complete insertion of the genital organs of one person into the genital organs of another person. The prosecution is required to prove that the perpetrator's actions caused penetration. We have re-evaluated the evidence on record. The complainant's evidence was that she was alone at the material time when the appellant came and asked her where her father was and she told him he had gone to graze the cows. He followed her to the toilet, he lifted her dress, held her neck, covered her mouth, told her not to scream and defiled her.
21. The complainant's evidence was corroborated by her mother who found the complainant crying complaining that she had stomach pain. She examined her and noted that she was bleeding from her vagina. This evidence was supported by PW5. In addition, PW2, the clinical officer confirmed that upon examination, he noted that the complainant was bleeding from her vagina which had a laceration and a tear which was consistent with penetration. The appellant was also examined and bruises were noted on the head of his penis.
22. Her mother (PW1) testified that on 21st September 2015 she travelled to Tabaka to attend a funeral. She returned the next day at around 11am and found the complainant crying complaining of stomach pain. Together with her brother-in-law, they checked her private part and noted that she was bleeding. They took her to Otyachi Hospital and explained to the Doctor her condition. The Doctor asked them to step out so that he could speak to PW1. PW5's evidence was substantially similar to that of PW2; therefore, it will add no value to rehash it here.
23. The clinical officer, (PW2) testified that the complainant had a history of vaginal bleeding, her vagina had a laceration and a tear which were consistent with defilement. Urinalysis showed puss and red



blood cells. It was also his evidence that the appellant was also examined at the same hospital and his penis head had bruises. He produced the complainant's P3 form and the PRC form. Upon cross examination, he confirmed that the complainant was admitted at the hospital so that she could be stabilized. PW6 produced the complainant's blood-stained pant. He also confirmed seeing blood stains at the toilet.

24. The trial magistrate had the following to say regarding penetration: "On the issue whether the complainant was defiled, the prosecution called a clinician who confirmed that the complainant had a tear and although it did not require any stitching, it was an indication of penetration. It would therefore be safe to conclude that indeed the complainant was defiled."

25. On the same issue, the first appellate court after rehashing the complainant's evidence stated:

"PW2's testimony corroborates the complainant's evidence on penetration, PW2 testified that the child had pre-vaginal bleeding. On cross-examination PW2 testified that the child had a tear in the private parts, evidence of penetration. There is therefore sufficient evidence on record to prove penetration. I therefore find and hold that penetration was proved by the prosecution."

26. This Court has consistently held that concurrent findings of fact by the two courts below should not be disturbed unless they are perverse or based on no evidence. This principle was reiterated by the Supreme Court in *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [supra]. We find no reason for us to disturb the concurrent findings by the two courts below on this issue. This ground of appeal fails.

27. Another critical ingredient for establishing an offence under section 8

1. of the Act is prove of the complainant's age. This is because age is not only one of the essential ingredients of the offence, but the sentence to be imposed is categorized based on the age bracket, such that the younger the victim, the more severe the sentence prescribed by the Act. The section under which the appellant was charged is specific that the victim must be a child aged 11 years or below. The clinical officer testified that the complainant was aged 9 years. PW6 produced the complainant's birth certificate which clearly shows that the complainant was aged 9 years. This Court in *Mwalango Chilango Chichoro vs R* [2016] eKLR 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 documentary 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..."

28. Age is an issue of fact. We are persuaded that the birth certificate sufficiently established that the complainant was 9 years old at the time she was defiled. Therefore, the ingredient of age was proved beyond reasonable doubt. We find no reason to depart from the concurrent findings by the two courts below on the issues.

29. Last, is the question whether the appellant was properly identified as the offender. The two courts below were satisfied by the evidence tendered that the appellant was positively identified. We can only reiterate that the appellant admitted going to the complainant's home, thus, placing himself at the scene. Equally important is the undisputed fact that the appellant is an uncle to the complainant and a brother-in-law to the complainant's mother. It is also on record that the two homes are barely 300



meters apart. Lastly, the appellant was known to the victim, and the offence took place during the day. With all these undisputed facts, it is evident that this was a case of recognition. We are persuaded that there is no likelihood of a mistaken identity. The finding that the appellant was known to the complainant is in our view grounded on sound evidence. Therefore, the identification was safe.

30. Lastly, the appellant maintained that the sentence of life imprisonment is harsh, excessive and unjustifiable. Section 8(2) of the 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 life imprisonment. This being the only sentence prescribed by the law, once the trial court was satisfied that all the ingredients of the offence of defilement had been proved beyond reasonable doubt, (as we have already found in this judgment), there was no room for the trial court or the first appellate court to exercise discretion because the only sentence provided under the said section is life imprisonment. In any event, severity of sentence in a second appeal is a question of fact pursuant to section 361(2) of the Criminal Procedure Act. The said provision bars this court from entertaining matters of fact in a second appeal. The Supreme Court in *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [supra] clarified that the minimum mandatory sentences provided under the Act are lawful so long as they remain in the statute. The said decision is binding to this Court. Accordingly, we cannot temper with the said sentence. The upshot is that this appeal is without merit and the same is hereby dismissed in its entirety.

31. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY, 2026.

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

