MK v Republic (Criminal Appeal E042 of 2025)
[2026] KEHC 1431 (KLR) (4 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1431 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E042 OF 2025

JN NJAGI, J

FEBRUARY 4, 2026

BETWEEN

MK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment and conviction by Hon. J. M.Kituku, SPM and sentence imposed by Hon.S.D.Sitati, SRM in Kilifi SPM`s Court Sexual Offence Case No. E090 of 2022 delivered on 23/1/2024)

JUDGMENT

1. The appellant was convicted by Hon. J.M. Kituku of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence were that on the 7th November 2022 at Tezo location Sub-County within Kilifi County he intentionally caused his penis to penetrate the vagina of L.M.S. (herein referred to as the complainant), a child aged 13 years.

2. After judgment was delivered by Hon. Kituku, the Appellant was sentenced by Hon. Sitati to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal.

3. The grounds of appeal as per the amended supplementary grounds of appeal dated 8/3/2024 are that:

    1. That the learned trial magistrate erred in law and fact for not appreciating the appellant was not accorded a fair trial pursuant to Article 50(4) of *the Constitution* of Kenya.

    2. That the learned trial magistrate erred in law and fact for placing its reliance on single evidence of the minor which was not corroborated by and independent evidence.

3. That the learned trial magistrate erred in law and fact for not observing that the evidence presented before the trial court was insufficient to warrant the appellant to offer a defence.

4. That the learned trial magistrate erred in law and fact for not observing that the evidence was full of glaring contradictions and inconsistencies.

5. That the learned trial magistrate failed to consider that the appellant was not accorded an opportunity for mitigation as part of the trial process.

6. That the sentence which was imposed on the appellant was harsh and excessive in the circumstances of his case.

Case for prosecution

4. The complainant who was PW3 in the case testified that she was a primary school pupil in class 4 and was at the material time aged 13 years. That the Appellant was a brother to her aunt.

5. That on the material day she was on her way to school when the Appellant followed her from behind. That he tried to talk to her but she ignored him. He then grabbed her hand and pushed her to the bushes. He threatened to kill her. He removed her clothes and had sex with her. She screamed and two ladies came from nearby homes and rescued her. They took her to her school and reported to the head teacher. Her guardian uncle PW2 was called. He went to the school. She was taken to Kilifi County Hospital where she was examined and treated.

6. The complainant's uncle PW2 testified that the complainant is an orphan and had stayed at his home for 2 months. That the Appellant was his relative. He had leased a house near his home and used to eat at his house.

7. That on the 7th November 2022 he, PW2, was called by a teacher at the complainant's school and asked to go to the school. He went to the school. He was informed that the complainant had been defiled by the Appellant. He took her to hospital and later to the police station. The Appellant was arrested after 3 days.

8. A clinical officer, PW5, testified that he examined the complainant and found her with whitish discharge, a broken hymen but no injuries. He filled her Post Rape Case Form.

9. Another Clinical Officer PW1 testified that he examined the complainant on 8/11/2022 and filled her P3 Form. He found her with a broken hymen, a visible injury on the outer genitalia and whitish discharge. She was sent to the laboratory whose results revealed an infection. He treated her.

10. The case was investigated by PC Agnes Charo PW4 of Ngerenya Police Station. It was her evidence that PW2 and the complaint went to the Police Station and reported that the complainant had been defiled on the previous day at 7 am on her way to school. She said that she had screamed and was rescued by two women. That she identified her assailant as the appellant. The ladies took her to her school. That her guardian was summoned and he took her to hospital. She, the investigating officer, recorded statements of witnesses and issued her with a P3 form. She visited the scene after 2 days but she did not find anything. However, that the two ladies who witnessed the incident refused to record statements. The appellant was arrested and charged with the offence. During the hearing of the case in court the clinical officer who filled the PRC form PW5 produced it in court as exhibit, P.Ex.3. The second clinical officer who completed the P3 form PW1 produced it in court as exhibits, P.Ex.1. The investigating officer PW4 produced the age assessment report as exhibit, P.Ex.2.

Defence Case

11. When placed to his defence the Appellant stated in an unsworn statement that he was residing with his in-laws at Tezo. That PW2 suspected that he was in love with his wife and they fought. That the complainant attempted to attack him with a wooden stick but he disarmed her and beat her up. He moved out of the homestead. He was arrested at a video shop and was charged. He denied the charges. He did not call any witness in the case.

12. The appeal was canvassed by way of written submissions.

Appellant`s submissions

13. The appellant submitted that his trial contravened Article 50 (4) of *the constitution* in that the complainant when presented before the court to testify stated that she could not remember what happened and she did not know why she was in court. That at that point the complainant was stood down but later called back to the dock to proceed with her evidence during which she narrated as to what happened despite earlier saying that she could not remember what had happened. The appellant submitted that the evidence of the witness lacked veracity, was not consistent and should not have been relied on to convict him. 14. The Appellant relied on the case of Ndung'u Kimani-v-Republic (1979) 282 where it was observed that:

    The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

15. The Appellant submitted that the prosecution did not present the two ladies who were said to have rescued the complainant from the Appellant. That failure to call them invited an inference that had they been called their evidence would have been adverse to the prosecution case - as per Bukenya & another-v-Uganda (1972) EA 549. That the act was a violation of fair trial as established in Article 50(2) of *the constitution*.

16. The Appellant argued that he was not given an opportunity to offer his mitigation contrary to section 216 and 329 of the Criminal Procedure Code. That this was a violation of the principle of fair trial as established under Article 50 (2) of *the constitution*.

17. It was further submitted that the sentence imposed on the Appellant was harsh and excessive as to amount to a miscarriage of justice. That the words used in Section 8 (1) of the *Sexual Offences Act* are, "shall be liable to .....", which in his opinion does not connate a minimum sentence but the maximum sentence and therefore that the court had the discretion to impose a lesser sentence. The Appellant urged the court to allow the appeal.

Respondent;s Submissions

18. The Respondent on the other hand submitted that the ingredients of the offence of defilement were proved beyond reasonable doubt. That the age of the complainant was proved by the oral evidence of the complainant and her uncle, PW2. That the evidence of the complainant proved that she was penetrated by the Appellant. That her evidence was corroborated by the evidence of the Clinical officers PW1 and PW5 whose evidence was that the complainant had a broken hymen, visible bruises and whitish vaginal discharge.

19. The Respondent submitted that the complainant identified the Appellant as her uncle. That they shared a homestead and he was therefore well known to her. That the Appellant did not deny knowing the complainant but confirmed that he was related to PW2 and by extension to the complainant.

20. It was submitted that the assertion that the right of the Appellant to fair trial was infringed upon is unfounded. So is the argument that the evidence tendered by the prosecution was inconsistent, contradictory and conflicting.

21. On the sentence meted on the Appellant, it was submitted that the minimum sentence under Section 8 (3) of the *Sexual Offences Act* is 20 years imprisonment. That the Appellant was sentenced to the minimum sentence. The Respondent urged the court to dismiss the appeal.

Analysis and determination

PARA 22.

This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding of the Court of Appeal in the case of Kiilu & another v Republic [2005]1 KLR 174 that:

> 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."

23. The elements of the offence of defilement that the prosecution is required to proof beyond reasonable doubt are: proof of the age of the victim, proof of penetration and proof of the identity of the of the perpetrator, see the Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.

24. The complainant in her evidence stated that she was aged 13 years. So did her uncle PW2. Her age assessment report was produced by the investigating officer PW4 that indicated that she was aged 13 years. The clinical officer who completed her P3 form indicated in Part "C" of the form that her estimated age was 13 years. From all this evidence it was proved that the complainant was aged 13 years.

25. The Appellant was a person well known to the complainant. They were both staying at the home of the complainant`s uncle, PW2. The Appellant admitted that he was well known to the complainant. Identity of the Appellant in those circumstances would not be an issue as the incident occurred during the day and when the complainant was heading to school.

26. The complainant being of the age of 13 years was a child of tender age. A child of tender age was defined in the case of Kibageny Arap Kolil v Republic [1959] EA 92 to mean a child under the age of fourteen years. That being the case, the trial court was required under the provisions of section 19 of the *Oaths and Statutory Declarations Act* to conduct a voir dire examination on her before admitting her evidence in court with the purpose of determining whether she was possessed of sufficient intelligence to justify the reception of her evidence and understood the nature of oath. The court allowed her to give sworn evidence in court without the court complying with the said provisions.

27. The purpose of voir dire examination was explained by the Court of Appeal in Johnson Muiruri vs Republic [1983] KLR 445 as follows:

> "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.....
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> A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth....
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> The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

28. In Maripett Loonkomok v Republic [2015] eKLR, the Court of Appeal had his to say in respect of voir dire examination:

> "Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth...The question therefore is, who is a child of tender years? The *Sexual Offences Act* and the *Oaths and Statutory Declarations Act* are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R, Criminal Appeal No 137 of 2014 and in Samuel Warui Karimiv R Criminal Appeal No 16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honored 14 years remains the correct threshold for voire dire examination.....
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> It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that;
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> > "In appropriate cases where voire dire is not conducted, but there is sufficient independent evidence to support the charge ... the court may still be able to uphold the conviction".

29. It is clear from the foregoing authorities that the evidence of a child of tender years that has been taken without the court conducting a voir dire examination cannot be used to convict an accused

person unless there is sufficient independent evidence to support the charge. This is the position taken by Mrima J. in Sammy Ngetich v Republic [2018] eKLR where the trial court took the evidence of a complainant aged 13 years without conducting a voir dire examination. The court set aside the conviction.

30. In Abdi Abdiraham & another v Republic (2013) eKLR, the High Court at Garissa set aside a conviction and sentence of the appellant on account of failure on the part of the trial magistrate to conduct voir dire examination of the child who was aged 13 years at the time she gave evidence.

31. In Samuel Warui Karimi v Republic [2016] eKLR where the trial court failed to conduct a voir dire examination on a complainant aged 12 years, the Court of Appeal held that her evidence was not properly received and the conviction of the appellant was unsafe.

32. The evidence of the complainant herein was therefore not properly taken due to the failure by the trial court to conduct a voir dire examination before receiving the evidence. The question is whether there was independent evidence to sustain the conviction.

33. The evidence of both clinical officers PW1 and PW5 who examined the complainant was on whether the complainant was defiled but not on who did it. The complainant`s uncle PW2 and the investigating officer PW4 did not witness the defilement as they were not at the scene. The women who were said to have witnessed the incident did not testify in the case. There was thus no independent evidence that the Appellant defiled the complainant. In the absence of such evidence, the conviction of the Appellant was unsafe.

34. In view of the foregoing, it is my finding that the trial against the Appellant was a mistrial that was vitiated by the failure of the trial court to conduct a voir dire examination before allowing the complainant to testify in the case. That being the case, the question is whether I should order a retrial.

35. The principles governing whether a re-trial should be ordered or not were enunciated in Fatehali Manji v Republic [1966] EA 343 by the East Africa Court of Appeal as follows:

> " In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person."

36. In Mwangi v Republic [1983] KLR 522 the Court of Appeal also held thus:

> " We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

37. The offence in this case was said to have been committed in the November 2022. The sentence served by the appellant is not substantial. In my view, the interests of justice in this case calls for a re-trial. The prosecution had a strong case against the Appellant and a conviction might result if the Appellant is re-tried of the offence.

38. The upshot is therefore that this court finds the Appellant`s trial to have been a mistrial. Consequently, I order that the Appellant be re-tried of the offence before another magistrate of competent jurisdiction.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 4TH DAY OF FEBRUARY, 2026.

J. N. NJAGI

JUDGE

In the presence of:

Miss Ochola for Respondent

Appellant -present virtually at GK Prison Malindi

Court Assistant - Rahma